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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 275.

PACIFIC COAST DAIRY, INC., a corporation,

Appellant,

vs.

DEPARTMENT OF AGRICULTURE OF THE STATE OF CALIFORNIA; WILLIAM J. CECIL, Director of Agriculture of the State of California; BUREAU OF MARKET ENFORCEMENT OF THE STATE OF CALIFORNIA; C. J. CAREY, Chief; E. E. BROWN, Auditor of the Bureau of Market Enforcement of the Department of Agriculture of the State of California,

Appellees.

BRIEF FOR APPELLEES.

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Appellees.

BRIEF FOR APPELLEES.

Opinion Below.

The official report of the opinion of the Supreme Court of the State of California, the court from which the appeal is taken in this proceeding, is found in *Pacific Coast Dairy, Inc. v. Department of Agriculture of the State of California, et al.,* 19 Cal. (2d) 818, 123 Pac. (2d) 442, and is set forth in the Transcript of Record, pages 14 to 26, inclusive.

Jurisdictional Statement.

The judgment of the Supreme Court of California was entered March 12, 1942, [R. 14.] The appeal was taken June 4, 1942 [R. 26] and allowed the same day. [R. 28.]

A Statement as to Jurisdiction was filed herein setting forth the grounds on which the jurisdiction of this Court is invoked, and on October 12, 1942, further consideration of the question of the jurisdiction of this Court in this case was postponed to the hearing of the case on the merits. [R. 31.]

Preliminary Statement.

As up to the time of printing this brief (January 4, 1943) no brief has been served or filed by appellant, appellees are perforce confined to answering the Assignment of Errors [R. 27] and Points Relied On [R. 30], as filed herein by appellant, without benefit of its argument in support thereof.

Statement of the Case.

Pacific Coast Dairy, Inc., petitioner in the State court (appellant herein) a distributor of fluid milk licensed by the State of California, sought a writ of mandate in the State Supreme Court directing the respondents, as officials of the State of California, to dismiss certain departmental proceedings undertaken pursuant to section 737.11[1] of the Agricultural Code of the State of California with the object of revoking petitioner's license as a milk distributor.

The State Supreme Court issued an alternative writ of mandate directing respondents to vacate said order to

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[1]Appendix A, p. 28.

show cause and to dismiss the departmental proceedings or show cause why they had not done so.

The Return of respondents to the alternative writ consisted of a general demurrer alleging that the petition did not state facts sufficient to constitute a cause of action to entitle petitioner to the relief prayed for or to any relief. The State Court discharged the alternative writ and denied a peremptory writ of mandate.

The Statute in Question.

The statute in question, Chapter 10, Division IV of the Agricultural Code of the State of California, sometimes designated as the California Milk Control Law, is set forth in full as Appendix "A" to this brief.

The original act became effective June 1, 1935 (Stats. 1935, Ch. 241). It has been amended at subsequent sessions of the Legislature to and including 1941. The statute, itself, has been held constitutional (*Jersey Maid Milk Products Co. v. Brock*, 13 Cal. (2d) 620, 91 Pac. (2d) 577; *Ray v. Parker*, 15 Cal. (2d) 275, 101 Pac. (2d) 665), and its validity as a whole is not here attacked by appellant.

The Provision of the Statute and of the Stabilization and Marketing Plan Involved Herein.

Subdivision (6) of section 736.3(a) of the Agricultural Code added by amendment in Stats. 1941, Chap. 1214, page 3008, at page 3012, provides as follows:

> "Any stabilization and marketing plan shall contain the following provisions:
>
> (a) Provisions for prohibiting distributors and retail stores from engaging in the unfair practices hereinafter set forth:
>
> * * * * * * * *

(6) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area, whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area."

This provision, which in accordance with the terms of the statute was incorporated in the stabilization and marketing plan for the Santa Clara County Marketing Area, was the basis of the departmental proceedings for revocation of petitioner's license and is the provision the validity of which is directly challenged by appellant in this proceeding.

Section 736.3(a) also contains various other prohibited unfair practices, among which we direct attention to subdivisions (a) (7)[2] and (a) (8),[3] which are quoted in the opinion of the State Supreme Court.

Departmental Proceedings.

The departmental proceedings heretofore mentioned were initiated on November 5, 1941, by the filing of a verified complaint with the Director of Agriculture alleging facts claimed to constitute a violation of the aforesaid terms and provisions of the statute and of the stabilization and marketing plan for fluid milk in effect in the Santa Clara County Marketing Area.

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[2]Appendix A. p. 14.
[3]*Ibid.*, p. 14.

The verified complaint upon which the departmental proceedings were commenced was made a part of the petition for writ of mandate herein (Exhibit B thereof). [R. 7-10.]

It alleges that Pacific Coast Dairy, Inc. (appellant herein) is a licensed distributor of fluid milk; that General Order No. 98 of the Director of Agriculture created and described the Santa Clara County Marketing Area; that a stabilization and marketing plan is in effect in the Santa Clara County Marketing Area; that schedules of minimum wholesale and minimum retail prices for fluid milk are also in effect in the Santa Clara County Marketing Area; that Moffett Field is located in Santa Clara County at Mountain View, about thirty-five miles southeast of San Francisco, California, and is situated in the geographical area within the outer, outside and external boundaries or limits of the Santa Clara County Marketing Area; that on October 15, 1941, said Pacific Coast Dairy, Inc. entered into a contract with the War Department of the Federal Government, signed by the Quartermaster's Department of Moffett Field, whereby it agreed to deliver and sell to said War Department fluid milk for $0.025 per half pint, which price is less than the minimum wholesale price established for fluid milk in half pint containers in said Santa Clara County Marketing Area; that on or about November 1, 1941, said Pacific Coast Dairy, Inc. did purchase, process, bottle, transport and deliver fluid milk in the Santa Clara County Marketing Area, which milk was sold or disposed of by it in accordance with the above mentioned contract, at less than the minimum wholesale price effective in the Santa Clara County Marketing Area to the Federal Government at Moffett Field. [R. 10.]

Upon the filing of said verified complaint on November 5, 1941, the Director of Agriculture took action in accordance with section 737.11 of the Agricultural Code and issued a departmental order for said Pacific Coast Dairy, Inc. (appellant herein) to show cause why its license as a distributor of fluid milk should not be suspended or revoked because of the alleged violation of said unfair practice provisions of the statute and of the stabilization and marketing plan.

At this point petitioner (appellant herein) filed its petition in the State Supreme Court for writ of mandate to prevent further action in the proceeding thus pending before the Department of Agriculture.

Petition for Writ of Mandate.

The petition for writ of mandate does not controvert any of the allegations of fact set forth in the verified complaint filed with the Department of Agriculture; and appellant concedes that it purchased, processed, bottled, handled and transported in the Santa Clara County Marketing Area the milk which it sold at Moffett Field. [R. 1-10.]

It expressly admits the contract between petitioner and the War Department to deliver and sell fluid milk at a price less than the minimum wholesale price for such milk established in the Santa Clara County Marketing Area, but alleges that the delivery and sale of such milk took place within the exclusive jurisdiction of federal territory, to wit, Moffett Field. [R. 2.]

The petition further alleges in substance that more than fifteen years ago Moffett Field was purchased[4] by the Government of the United States for erecting forts, magazines, arsenals, dockyards and other needful buildings pursuant to Article I, section VIII, paragraph 17, of the Federal Constitution[5] and section 34 of the Political Code

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[4]Article I, section 8, clause 17, of the United States Constitution provides:

> "To exercise exclusive Legislation * * * over all Places *purchased* by the Consent of the Legislature of the State * * *." (Italics supplied.)

Moffet Field was not acquired by purchase. The Act authorizing its acquisition (46 Stat. 1092, ch. 122) provides:

> "That the Secretary of the Navy is hereby authorized to accept on behalf of the United States, free from encumbrance *and without cost to the United States*, a title in fee simple to such lands as he may deem necessary or desirable near Sunnyvale, in the county of Santa Clara, State of California * * *." (Italics supplied.)

Therefore, it is questionable whether the authority of the Federal Government over this area is determined by Article I, section 8, clause 17, of the United States Constitution or by the California Act of Cession (Cal. Stats. 1897, p. 51), which provides:

> "The State of California hereby cedes to the United States of America exclusive jurisdiction over all lands within this State now held, occupied, or reserved by the Government of the United States for military purposes or defense, or which may hereafter be ceded or conveyed to said United States for such purposes; * * *."

[5]Article I, section VIII, paragraph 17, Federal Constitution:

> "To exercise exclusive Legislation in all Cases Whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-yards, and other needful Buildings;—"

of California,[6] and that the Government of the United States still occupies Moffett Field and uses it for the same purposes; that by reason thereof the State has no jurisdiction in the premises and that enforcement of the statute would result in deprivation of property without due process of law in violation of the Fourteenth Amendment. [R. 4-5.]

Respondents (appellees herein) concede that Moffett Field has been at all times herein mentioned a federal enclave subject to the exclusive jurisdiction of the Federal Government.

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[6]Section 34, Political Code of California:

"The legislature consents to the purchase or condemnation by the United States of any tract of land within this state for the purpose of erecting forts, magazines, arsenals, dock-yards, and other needful buildings, upon the express condition that all civil process issued from the courts of this state, and such criminal process as may issue under the authority of this state, against any person charged with crime, may be served and executed thereon in the same mode and manner and by the same officers as if the purchase or condemnation had not been made."

The Issue Involved.

The issue raised by appellant is whether subdivision (6) of section 736.3(a) of the California Agricultural Code is an unconstitutional attempt of the State to extend its power into territory exclusively under the federal jurisdiction.

The State Supreme Court said [R. 19]:

> "The question is not whether the State can prescribe the minimum prices at which milk may be sold on the territory within the exclusive jurisdiction of the United States (Cf. Consolidated Milk Producers v. Parker, 19 Cal. (2d) 815, 123 Pac. (2d) 440), but whether it has power to regulate acts within its jurisdiction even though they are followed in direct line of succession by a transaction outside its jurisdiction."

More specifically,—is the State denied the power to prohibit its licensed distributors from purchasing, processing, bottling, transporting and handling within its jurisdiction fluid milk when such milk is sold for less than the minimum price prescribed for the area where such purchasing, processing, etc., occurs, merely because such sale is made in a federal enclave situated within the geographical boundaries of the marketing area?

Summary of Argument.

1. The judgment sought to be reviewed is a final judgment within the meaning of section 237 of the Judicial Code. The ultimate issue in this mandamus proceeding is whether the State Department of Agriculture has jurisdiction of the proceedings instituted before it to enforce against appellant the provisions of subdivision (6) of section 736.3(a) of the California Agricultural Code. That question was finally disposed of by the State Court. It is settled that a judgment awarding or refusing a writ of mandamus is a final judgment within the meaning of said section 237.

2. The California Milk Control Law is a valid and constitutional exercise of the police power of the state in the interest of the public and for the protection of the health and welfare of the people of the State.

In re Willing, 12 Cal. (2d) 591, 594, 86 Pac. (2d) 663;

Ray v. Parker, 15 Cal. (2d) 275, 101 Pac. (2d) 665.

The purpose of the statute is to eliminate economic disturbances and unfair practices and insure to producers the necessary costs of production so that an adequate supply of pure and healthful milk may be assured. Such economic security is necessary to maintain compliance with essential sanitary requirements.

In re Willing, supra, p. 594.

The statute is not primarily aimed at what the consumer shall pay, but what must be received in order to maintain an adequate supply of pure and wholesome milk.

United Milk Producers v. Cecil, 47 Cal. App. (2d) 758, 768, 118 Pac. (2d) 830.

3. Subdivision (6) of section 736.3(a) of the California Agricultural Code, added by amendment in 1941, is a valid exercise of this police power. The regulation bears directly upon the evil sought to be remedied and focalizes upon the acts of the licensed distributor within the jurisdiction of the state.

The incidence of the statute is upon the distributor and not upon the Federal Government. The legislation is not aimed at the Federal Government but is designed to meet a local situation which if left unregulated presents a menace to the milk supply of the State and to the health of its inhabitants. The statute in question is not unreasonable, arbitrary, or capricious, and the means adopted bear a real and substantial relation to the object sought to be attained. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids.

Nebbia v. New York, 291 U. S. 502, 54 S. C. 505, 78 L. Ed. 940;

Osborn v. Ozlin, 310 U. S. 53, 60 S. C. 758, 84 L. Ed. 1074;

Alaska Packers Assn. v. Ind. Acc. Comm., 294 U. S. 532, 55 S. C. 518, 79 L. Ed. 1044.

The statute is not rendered invalid merely because the practical effect thereof might be to interfere to some

extent with the functioning of an instrumentality of the Federal Government, so long as such interference or burden is reasonable. The alleged interference here is reasonable. The statute does not discriminate against the government, but is applicable to the State itself and to its political subdivisions. If the objectives of the statute are realized the government will benefit in common with the community in general.

Milk Control Board v. Gosselin's Dairy, 301 Mass. 174, 16 N. E. (2d) 641;

Paterson Milk & Cream Co. v. Milk Control Board, 118 N. J. Law. 383, 192 Atl. 838;

James v. Dravo Contracting Co., 302 U. S. 134, 58 S. C. 208, 82 L. Ed. 155, 114 A. L. R. 318.

4. The only specific burden claimed to be cast upon the government is that of increased cost. Under the authorities this does not constitute an unconstitutional burden or interference. Such increased cost "at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct." It is merely incidental to the proper exercise of the police power.

James v. Dravo Contracting Co., supra, U. S. p. 160, S. Ct. p. 221.

Alabama v. King and Boozer, 314 U. S. 1, 62 S. C. 43, 86 L. Ed. 1;

James Stewart & Co. v. Sadrakula, 309 U. S. 94, 60 S. C. 431, 84 L. Ed. 596.

5. The state statute does not run counter to the Federal statutes requiring competitive bidding since it fixes minimum prices only.

6. The State statute does not run counter to the commerce clause of the Federal Constitution.

The interstate commerce question was not raised by the pleadings, and the language of the State Court holding that commerce between a State and a federal area within that State constitutes interstate commerce may well be regarded as *dictum*. To hold at this late date that commerce between a State and such federal areas within that State is interstate commerce, after nearly a century and a half during which the States and the Federal Government have treated that commerce as *intra*state commerce, would only result in utter, hopeless confusion. Such commerce has never been regarded as being interstate commerce. The courts that have directly considered that question have all held to the contrary.

Grayburg Oil Co. v. State, ... Tex. ....; 286 S. W. 489;

Grayburg Oil Co. v. State, ... Tex. ...., 3 S. W. (2d) 427;

People v. Standard Oil Co., 218 Cal. 123, 22 Pac. (2d) 2.

Even if it be assumed that such commerce is interstate and that under the Agricultural Marketing Agreement Act of 1937 the Secretary of Agriculture has the power to regulate the distribution of milk moving into such federal areas, the fact remains that he has not exercised such power. Under such conditions the State is not deprived of its power unless and until Congress has actually acted in a manner hostile to or directly in conflict with the State regulation.

Kelly v. Washington, 302 U. S. 1, 10, 58 S. C. 87, 92, 82 L. Ed. 3, 10-11;

Allen-Bradley Local 1111 v. Wisconsin Emp. Rel. Board, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 802.

I.

The Judgment Sought to Be Reviewed Is Final Within Section 237 of the Judicial Code.

The court, in postponing jurisdiction in this matter, requested counsel to discuss whether the judgment sought to be reviewed is final within section 237[7] of the Judicial Code.

The State Constitution provides that the Supreme Court shall "have power to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all other writs necessary or proper to the complete exercise of its appellate jurisdiction." (California Constitution, Art. VI, Sec. 4.)

That section has been held to give the court original jurisdiction in mandamus proceedings.[8]

> "Unless otherwise specially ordered, or a rehearing be granted, judgments of the Supreme Court in bank become final at the end of the thirtieth day after the date of pronouncement . . ."[9]

This proceeding was commenced in the State Supreme Court with the filing of a petition for a writ of mandamus.

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[7]Section 237 of the Judicial Code, in so far as we are here concerned therewith, provides as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had . . . where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

[8]*Hyatt v. Allen*, 54 Cal. 353;
Santa Cruz etc. Stock Co. v. Board of Supervisors, 62 Cal. 40;
Scott v. Boyle, 164 Cal. 321;
Dufton v. Daniels, 190 Cal. 577, 213 Pac. 949.

[9]Rule XXX, Rules for Supreme Court. Printed in 18 Cal. 2d 1, at page 23. See, also, Constitution, Article VI, Section 2.

The Court, in the exercise of its original jurisdiction, issued an alternative writ. The judgment of the court denying the peremptory writ was pronounced on March 12, 1942, and became final on April 11, 1942.

Under the decisions of the State Supreme Court a mandamus proceeding is an independent proceeding having for its purpose the compulsion of an act which the law specifically enjoins as a duty resulting from an office, trust or station.[10]

In this original proceeding the State Supreme Court determined finally that the petitioner was not entitled to the writ of mandate which it sought. Under the decisions of this court that judgment constitutes a final judgment within the meaning of section 237 of the Judicial Code.

The rule is stated to be that "all judgments and decrees which determine the particular cause are final in the sense of the statute * * * and it is settled that a proceeding in a mandamus is an independent adversary suit and a judgment awarding or refusing the writ is a final judgment within the meaning of the statute."[11]

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[10] *Sheehan v. Board of Police Commissioners*, 188 Cal. 525, 206 P. 70;
Boggs v. Jordan, 204 Cal. 207, 267 P. 696.

[11] *Detroit etc. Ry. Co. v. Michigan R. R. Comm.*, 240 U. S. 564, 571, 36 S. Ct. 424, 60 L. Ed. 802;
Weston v. Charleston, 2 Pet. 449, 463-465;
Central Transportation Co. v. Pullman Co., 139 U. S. 24, 40, 11 S. Ct. 478, 35 L. ed. 55;
Mt. Vernon Cotton Co. v. Alabama Power Co., 240 U. S. 30, 36 S. Ct. 234, 60 L. ed. 507;
Davies v. Corbin, 112 U. S. 36, 40, 5 S. Ct. 4, 28 L. ed. 627;
McPherson v. Blacker, 146 U. S. 1, 13 S. Ct. 3, 36 L. ed. 869;
American Express Co. v. Michigan, 177 U. S. 404, 406, 20 S. Ct. 695, 44 L. ed. 823.
See, also:
Hartman v. Greenlaw, 102 U. S. 672, 26 L. ed. 271, and
Carroll v. Becker, 285 U. S. 380, 52 S. Ct. 402, 76 L. ed. 807.

The same rule obtains in proceedings in prohibition[12] and *habeas corpus*.[13]

Presumably the query of this Court as to jurisdiction was prompted by the fact that no final action had been taken revoking or suspending the license of appellant and that the proceedings for that determination are still pending before the State Director of Agriculture.

The instant proceeding for a writ of mandate is a distinct suit in court to test the jurisdiction of the Director of Agriculture to continue, with the proceeding pending before him.

The judgment of the State Court denying the writ finally disposed of that question of jurisdiction.

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[12] *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U. S. 30, 36 S. Ct. 234, 60 L. ed. 507;
Missouri ex rel. St. Louis, B. & M. Ry. Co. v. Taylor, 266 U. S. 200, 206, 45 S. Ct. 47, 69 L. ed. 247, 42 A. L. R. 1232;
Michigan Central R. Co. v. Mix, 278 U. S. 492, 494, 49 S. Ct. 207, 73 L. ed. 470;
Bandini Petroleum Co. v. Superior Court, Los Angeles County, Cal., 284 U. S. 8, 14, 52 S. Ct. 103, 76 L. Ed. 136, 78 A. L. R. 826;
Denver & Rio Grande W. R. Co. v. Terte, 284 U. S. 284, 285, 52 S. Ct. 152, 76 L. ed. 295.

[13] *Holmes v. Jennison*, 14 Pet. 540, 563, 614, 10 L. ed. 579, 618 append.;
People v. State of New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 70, 49 S. Ct. 61, 73 L. ed. 184, 62 A. L. R. 785, and cases cited.

In the *Bandini* case,[14] upon an appeal from a judgment denying a writ of prohibition sought to prevent the enforcement of a preliminary injunction, this Court said (p. 14 U. S., p. 105 S. Ct.):

> "This Court has jurisdiction. The proceeding for a writ of prohibition is a distinct suit, and the judgment finally disposing of it is a final judgment within the meaning of section 237(a) of the Judicial Code. (Citing cases.) That judgment, however, merely dealt with the jurisdiction of the Superior Court of the suit for injunction, and the only question before us is whether the District Court of Appeal erred in deciding the federal questions as to the validity of the statute upon which that jurisdiction was based."

In the *Grays Harbor*[15] and *Wick*[16] cases, suggested by this Court for comparison with the *Bandini* case, *supra*, the judgments of the state courts under review here were appeals from the Superior to the Supreme Court of the State in condemnation proceedings.

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[14] *Bandini Petrolcum Co. v. Superior Court*, 284 U. S. 8, 52 S. Ct. 103, 76 L. ed. 136, 78 A. L. R. 826.

[15] *Grays Harbor Logging Co. v. Coats Fordney Logging Co.*, 243 251, 37 S. Ct. 295, 61 L. ed. 702.

[16] *Wick v. Superior Court*, 278 U. S. 575, 49 S. Ct. 94, 73 L. ed. 514 (memo. dec.).

After hearing testimony upon the question of necessity, the Superior Court entered an order of condemnation and set the cause for trial to determine and assess the damages. At this point application for certiorari to the State Supreme Court was made to review the constitutionality of the order of condemnation. The latter court upheld the same and remitted the cause to the Superior Court for further proceedings.

This Court expressed some doubt as to whether this judgment of the State Supreme Court was final or not for the purposes of section 237 of the Judicial Court. It concluded, however, that it was not final because the State Supreme Court had not interpreted such judgments in any other sense than as interlocutory and had nowhere described them as "final" or as "independent" judgments.

Under these circumstances it seems clear that the judgment in the instant case is governed by the *Bandini* case, and not by the *Grays Harbor* and *Wick* cases; and is a final judgment within the meaning of section 237 of the Judicial Code.

II.

Constitutionality of California Milk Control Law.

That the state and federal governments may completely regulate the milk industry including the fixing of prices is no longer open to serious question.[17]

The constitutionality, aside from federal questions, of the California Milk Control Law has been thoroughly established by the courts of that State. (*Jersey Maid Milk Products Co. v. Brock, supra; Ray v. Parker, supra; In re Willing,* 12 Cal. (2d) 591, 86 Pac. (2d) 663.)

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[17] *Nebbia v. New York,* 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940;
Highland Farms Dairy v. Agnew, 300 U. S. 608, 57 S. Ct. 549, 81 L. ed. 835;
Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 55 S. Ct. 7, 79 L. ed. 259;
U. S. v. Rock Royal Co-op., 307 U. S. 533, 83 L. ed. 1440, 59 S. Ct. 993;
U. S. v. Wrightwood Dairy Co., 315 U. S. 110, 86 L. ed. 431, 62 S. Ct. 523;
Borden's Farm Products Co. v. Ten Eyck, 297 U. S. 251, 56 S. Ct. 453, 80 L. ed. 669;
Milk Control Board v. Eisenberg Farm Products, 306 U. S. 346, 59 S. Ct. 528, 83 L. ed. 752;
(Alabama) *Franklin v. State,* 232 Ala. 637, 169 So. 295;
(Florida) *Miami etc. v. Milk Control Board,* 124 Fla. 797, 169 So. 541;
(Georgia) *Bohannon v. Duncan,* 185 Ga. 840, 196 S. E. 897;
(Indiana) *Albert v. Milk Control Board,* 210 Ind. 283, 200 N. E. 688;
(Massachusetts) *Milk Control Board v. Gosselin's Dairy,* 301 Mass. 174, 16 N. E. (2d) 641;
(Michigan) *Johnson v. Mich. Milk Marketing Board,* 295 Mich. 644, 295 N. W. 346;
(New Jersey) *State v. Newark Milk Co.,* 118 N. J. Eq. 504, 179 Atl. 116;
(Oregon) *Savage v. Martin,* 161 Ore. 660, 91 Pac. (2d) 273;
(Pennsylvania) *Rohrer v. Milk Control Board,* 322 Pa. 257, 186 Atl. 336;
(Virginia) *Reynolds v. Milk Commission,* 163 Va. 957, 179 S. E. 507;
(Vermont) *State v. Auclair,* 110 Vt. 147, 4 Atl. (2d) 107;
(Wisconsin) *State v. Lincoln Dairy,* 221 Wis. 1, 265 N. W. 197.

III.

Subdivision (6) of Section 736.3(a) Is a Valid Exercise of the Police Power of the State.

As has already been shown, there can be no doubt as to the power of the State to regulate the purchasing, processing, bottling, delivering and handling of fluid milk within its own jurisdiction. And appellant does not generally attack the validity of this provision.

It is not contended that the State may not prohibit such purchasing, processing, etc. of fluid milk which is to be or is sold within the outer boundaries of a milk marketing area at less than the minimum prices prescribed for such area, whether the place of sale be a part of the marketing area or not, provided such place be within the jurisdiction of the State.

The question presented by this appeal is whether subdivision (6) may validly apply when such sale takes place to an agency of the Federal Government and upon a federal enclave (Moffett Field) located within the external boundaries of the State milk marketing area.

Appellees do not contend that Moffett Field is politically or jurisdictionally either within the State or within the Santa Clara County marketing area. It is, however, within the "outer, outside and external boundaries or limits" of both. There is no contention that California has any jurisdiction whatever over Moffett Field except to serve civil or criminal process therein.

The State of California has consistently maintained that it has no authority, and the California Director of Agriculture has persistently refused, to fix minimum

prices for milk sold within federal enclaves within its borders, such as Moffett Field and the San Francisco Presidio.[18]

This action was commenced prior to any declaration of war on the part of the United States and no conflict between state regulation and federal war time powers is involved.

We do contend that the purchasing, processing, bottling, transporting, delivering or other handling of fluid milk in the Santa Clara County Marketing Area under contract or arrangement for the sale or disposition thereof at prices less than the minimum wholesale or minimum retail prices effective in such marketing area constitutes an unfair trade practice which the State of California may effectively reach in the exercise of its police power. And we contend that this is true, notwithstanding the fact that subsequent to such purchasing, processing, etc., within the Santa Clara County Marketing Area the ultimate sale or disposition of such fluid milk occurs, or is to occur, at Moffett Field, a place within the geographical limits of the marketing area, but not politically or jurisdictionally within the area.

It may be that the effect of the exercise of such a power by the State of California will be to make it impracticable for the Federal Government to obtain at Moffett Field fluid milk at prices less than those established for the Santa Clara County Marketing Area surrounding the field, but that is purely incidental.

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[18]See opinions of California Atty. Gen., N.S. 1905 and N.S. 1950 [1939] and *Consolidated Milk Producers v. Parker*, 19 Cal. (2d) 815, 123 Pac. (2d) 440, decided by the State Supreme Court the same day as the instant case.

Of course we do not contend that the State of California would have power to regulate or control the acts or prices of milk distributors whose purchasing, processing, bottling, transporting, delivering or handling of the milk might occur wholly within the limits of Moffett Field.

For example, the Post Exchange, situated within the Presidio of San Francisco and operating wholly on territory subject to the exclusive jurisdiction of the United States, sells milk at retail to consumers largely composed of military personnel. The State does not attempt to regulate the prices of milk so sold to consumers on the reservation, nor do we contend that it would have power so to do. (*Standard Oil v. California*, 291 U. S. 242.)

However, to admit that the State has no power to regulate prices where the transaction is one wholly within Federal territory is not to admit that the State may not control acts within its own jurisdiction by prohibiting its licensed milk distributors from handling milk within the State unless an established minimum price is received for such milk, when the State has determined that the receipt of such minimum price is necessary to insure an adequate supply of pure and wholesome milk; even though the sale thereof be made within Federal territory.

The State Supreme Court recognized this differentiation in holding on the same day it decided the instant case, that the State was without authority to establish milk prices on Federal territory within the geographical boundaries of the State. (*Consolidated Milk Producers v. Parker*, 19 Cal. (2d) 815, 123 Pac. (2d) 440.)

A. Immunity of Federal Government.

It is conceded as a general legal proposition that the national government is immune from state regulation that constitutes a direct burden upon the Federal Government or interferes with the performance of its functions.

But this does not *ipso facto* immediately withdraw from the authority of State regulation every person dealing with the Federal Government or performing a part of the State regulated transaction upon federal territory.

The cases most generally advanced in support of what is often claimed to be complete immunity stem from *McCulloch v. Maryland*, 4 Wheat. 316.[19]

Chief Justice Marshall in the *McCulloch* case (p. 326) laid down the principle that the power to tax is the power to destroy.[20] He said: "A question of constitutional power can hardly be made to depend on a question of more or less."

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[19] *e. g.: Osborn v. U. S. Bank*, 9 Wheat. 738;
Ohio v. Thomas, 173 U. S. 276, 19 S. Ct. 453, 43 L. ed. 699;
Johnson v. Maryland, 254 U. S. 51, 41 S. Ct. 16, 65 L. ed. 126;
Hunt v. U. S., 278 U. S. 96, 49 S. Ct. 38, 73 L. ed. 200.

[20] Mr. Justice Frankfurter, in a concurring opinion in *Graves v. New York ex rel. O Keefe*, 306 U. S. 466, 489, 59 S. Ct. 595, 602-3, characterized this as a "seductive cliché," and said that "the web of unreality spun from" it "was brushed away by one stroke of Mr. Justice Holmes' pen" in the *Panhandle Oil* case, "'The power to tax is not the power to destroy while this Court sits.'"

Under this any State law which imposed a demonstrable burden upon the Federal Government was held to be invalid.[21]

It was this construction which for years resulted in the non-payment of state personal income taxes by federal employees and *vice versa*.[22]

In the *Osborn* case, *supra*, Chief Justice Marshall followed his opinion in the *McCulloch* case, *supra*, and held that a state could not tax a federal bank. It was in the course of the opinion that he said (p. 865): "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative."

It may well be that a contractor can not be restrained from purchasing military supplies within a state nor from transporting such supplies through such state to a military post. But it can hardly be said at this day that he marches through the State like Sherman's army through Georgia wholly freed from State regulation. In the making of

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[21]See Mr. Justice Roberts' dissenting statement in *James v. Dravo Contracting Co.*, 302 U. S. 134, 181, 58 S. Ct. 208, 230-1: "From that day to this the Court has consistently held that the question is not one of *quantum*, not one of the weight of the burden, but one of power. * * * Where the principle applies it is not affected by the amount of the particular tax or the extent of the resulting interference, but is absolute."

[22]*Cf. Collector v. Day*, 11 Wall. 113, 20 L. ed. 122, with *Helvering v. Gerhardt*, 304 U. S. 405, 58 S. Ct. 969, 82 L. ed. 1427, and *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 59 S. Ct. 595, 83 L. ed. 927, 120 A. L. R. 1466.

purchases he is subject to a state sales tax,[23] and in the transportation he undoubtedly must comply with State highway and traffic regulations.[24]

We know of no instance in which it has been held, or even seriously contended, that a contractor did not have to pay, or that a common carrier did not have to charge, the rates prescribed by the State railroad or public utility commission for such transportation within the State because the goods transported were for use by the Government on Federal territory within the State.

In *Ohio v. Thomas, supra* (1899), the governor of the soldiers' home was convicted of violation of the State law requiring a placard to be displayed in eating houses using oleomargarine, stating that fact. The conviction was reversed upon the ground that "the act complained of was performed as part of the duty of the governor as a Federal officer in and by virtue of valid Federal authority, * * *". (U. S., p. 284.)

Unquestionably the decision would have been to the contrary had defendant been an ordinary caterer furnishing meals to the inmates of the home under an independent contract. Certainly today the Federal Government looks to local regulation for the protection of its officers and soldiers in the meals furnished them in restaurants and hotels. Who will say that such a hotel or restaurant operator could successfully defend his violation of a local regulation upon the sole ground that such violation was committed only in the furnishing of food to a Federal officer or soldier?

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[23] *Cf. Alabama v. King & Boozer*, 314 U. S. 1, 62 S. Ct. 43;

[24] *Cf. South Carolina v. Barnwell*, 303 U. S. 177, 58 S. Ct. 510.

Johnson v. Maryland, supra (1920), held that an employee of the U. S. Post Office Department was not required to obtain a state motor license before transporting mail in a Government motor truck. Here, again, the decision turned upon the fact that the State requirement interfered directly with a Federal employee in the performance of his official duties.[25] Mr. Justice Holmes, who delivered the opinion, called attention to the fact that even "an employee of the United States does not secure a general immunity from State law while acting in the course of his employment."

In the instant case, however, no Federal official or employee is involved. The State regulation falls solely upon a citizen of that State in the conduct of an operation which at his request he has been licensed by the State to perform under certain conditions.

Whatever immunity from State regulation attaches to a Federal official or employee is not, however, generally applicable to private parties furnishing supplies or rendering services to the Federal Government in an independent capacity.

The present Chief Justice clearly marked this distinction in speaking of a party claiming such immunity,

> "who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes *not unlike a contract to sell and deliver a commodity*. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax itself can-

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[25] *Cf. Alward v. Johnson*, 282 U. S. 509, 51 S. Ct. 273, 75 L. ed. 496, where the Court sustained a state tax upon gross receipts of an *independent contractor* carrying United States mail.

not be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way."[26] (Italics supplied.)

It seems clear that the complexities of modern life and the increased interrelationship of Federal and State agencies due to the growth of governmental regulation has brought about a decline in the extent of Federal immunity.

Mr. Justice Holmes, who wrote the opinion in *Johnson v. Maryland, supra*, later (1928), reflected this in a dissenting opinion in the *Panhandle Oil* case,[27] joined in by the present Chief Justice and by Mr. Justice Brandeis.

It is an assumption, warranted by the practically unanimous[28] refusal of this Court to follow the majority opinion

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[26] *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524-5, 46 S. Ct. 172, 175, 70 L. ed. 384.

[27] *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 224-5, 48 S. Ct. 451, 453-4, 72 L. ed. 857:

"To come down more closely to the question before us, when the Government comes into a State to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else.

"* * * I am not aware that the President, the Members of Congress, the Judiciary or, to come nearer to the case in hand, the Coast Guard or the officials of the Veterans Hospital, because they are instrumentalities of Government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred. The question of interference with Government, I repeat, is one of reasonableness and degree. * * *"

[28] Mr. Justice Jackson did not participate.

in the *Panhandle Oil* case,[29] that the dissenting views expressed therein by Mr. Justice Holmes are now the views of the present Court.

Mr. Chief Justice Hughes in delivering the majority opinion in the *Dravo* case[30] sustaining the validity of a State tax upon the gross income of a contractor including his receipts from contracts performed for the Government stated that:

> "As 'neither government may destroy the other or curtail in any substantial manner the exercise of its powers,' we said that the limitation upon the taxing power of each, so far as it affects the other, 'must receive a practical construction which permits both to function with the minimum of interference each with the other; * * *'"[31]

It seems clear at the present time that Federal immunity is not complete and absolute. That "the question is not one of *quantum*, not one of the weight of the burden,

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[29] *Alabama v. King & Boozer*, 314 U. S. 1, 9, 59 S. Ct. 43, 45;

[30] *James v. Dravo Contracting Co.*, 302 U. S. 134, 156-7, 58 S. Ct. 208, 219, 82 L. ed. 155.

[31] It was after this decision that Mr. Justice Jackson, then the Attorney General of the United States, writing of Mr. Chief Justice Hughes in the American Bar Journal for July, 1941, Vol. 27, p. 410, said:

> "Apart from the field of taxation, however, the Chief Justice has gone very far in sustaining State regulatory statutes, particularly those which have been assailed as being in conflict with federal power. He has always appeared careful to concede the broad sweep of federal authority which could supersede the State statute if Congress should so desire; but even where Congress has legislated in the field, he has generally upheld the State statute if it was not in conflict with the federal legislation. State regulatory statutes generally have received hospitable consideration at his hands."

but one of power,"[32] as expresesd in the dissenting opinion in the *Dravo* case, is no longer correct; but instead, as stated by Mr. Justice Holmes in the *Panhandle Oil* case dissent, "the question * * * is one of reasonableness and degree * * *."[33]

The Federal Government may not be directly taxed nor regulated. But parties dealing with Federal Government or on its territory may be taxed or regulated, provided that such Government is not thereby unduly burdened or unreasonably interfered with.

For a determination of this question we must look to the purpose of the State statute and to its effect upon the Federal Government.

B. Purpose of State Statute.

The general trials and tribulations of the milk industry and the necessity for a governmental regulation of prices are clearly and vigorously set forth by Mr. Justice Roberts in the *Nebbia* case, *supra.*

The particular difficulties existent in California and the purpose and objectives of the Statute in that State are vividly portrayed in the language of Mr. Justice Traynor in the opinion of the State Supreme Court in the present case. [R. 16-18, 21.]

The preamble[34] to the statute declares:

> "that unfair, unjust, destructive and demoralizing trade practices have been carried on and are now

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[32] *James v. Dravo Contracting Co., supra,* U. S. p. 181, S. Ct. p. 230.

[33] *Panhandle Oil Co. v. Mississippi, supra,* U. S. p. 225, S. Ct. p. 454.

[34] Appendix "A," p. 5.

being carried on in the production, marketing, sale, processing or distribution of fluid milk and fluid cream which constitute a constant menace to the health and welfare of the inhabitants of this State and tend to undermine sanitary regulations and standards of content and purity, however effectually such sanitary regulations may be enforced; that health regulations alone are insufficient to prevent disturbances in the milk industry which threatens to destroy and seriously impair the future supply of fluid milk; * * *"

In its original form in 1935 the California Milk Control Law prescribed minimum prices to the producers only. To insure a sufficient return to the producer to enable him to stay in business and comply with the sanitary requirements, thus assuring the inhabitants of the State an adequate supply of pure and wholesome fluid milk is admittedly the prime objective of this legislation.

It has been urged at times, and was thought when this law was first enacted, that the bonding provisions[33] were sufficient to guarantee the payment of the prescribed minimum prices to producers. The bonds, however, proved to be wholly insufficient in amount to cover the losses to producers due to non-payment by distributors. A sufficient number of the latter continued their cut-throat competition with cut prices, rebates, discounts, gifts, etc. This naturally always resulted in the failure of a certain number of such distributors. Due to the practice in the milk industry of paying producers for milk furnished late in the succeeding month or even in the second succeeding month after it is

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[33]Appendix "A," Sec. 737.5(b), pp. 24-5.

delivered, the losses resulting from these failures were passed on and inevitably fell upon the producers.

Fluid milk is a perishable product which the producers must dispose of daily as it is produced. New outlets are difficult to obtain especially on short notice. The result is that producers are completely at the mercy of distributors 90% of the time. On the other hand the price of the raw product due the producer constitutes approximately 60% of the resale price of the finished product. Consequently a distributor can cut the ordinary or prescribed resale price 50%, collect from the purchasers and continue doing business just as long as he can avoid paying his producers or keep them in line by payments of fractional amounts on account.

Fortunately, or unfortunately, depending upon the viewpoint, the producer has a ready market for his dairy herd at the slaughter house for beef and when he has reached his limit he sends his cows to the slaughter house and the available supply of fluid milk is reduced just that much for the years that it takes to develop a new dairy herd.[38]

Upon investigation it was found to be impracticable to require an increase in the amount of the distributors' bonds sufficient to take care of this situation. Bonds in such an increased amount would be procurable by only a few large state-wide and national distributors because of the premium rates and collateral required. All the other smaller distributors would be eliminated.

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[38]This very practice is now an acute national problem due to the O.P.A. ceilings placed on wholesale and retail fluid milk prices without any corresponding ceiling on increasing labor and feed prices which make up the bulk of the cost to the producer of fluid milk.

In the light of these considerations Article 2A[37] was added in 1937 to provide for minimum wholesale and retail prices. This served to remedy the situation in so far as the milk distributed within a milk marketing area was concerned.

But it developed that considerable danger still existed because some distributors sold their milk beyond the jurisdiction of the marketing area and persisted in the old cut-throat practices. This led other distributors to dispose of their surplus in the same manner. The Presidio at San Francisco had long been a thorn in the side of the San Francisco Marketing Area. Producers constantly urged the Director of Agriculture to establish minimum prices in the Presidio but the State maintained that it had no authority to fix prices within this Federal territory. This finally resulted in the mandamus proceeding to compel the State to establish such prices and the denial of such a writ by the State Supreme Court.[38]

With the establishment of many military camps in California and the large increase in the amount of milk used therein this situation was greatly aggravated and the problem became acute, and the State Legislature was forced to grapple with it.

Subdivisions (6), (7), and (8) of section 736.3(a) were first offered in the California Legislature March 27, 1941. Subdivision (6) first appeared in its present final form on May 8, 1941. The bill containing these three subdivisions was finally passed June 14, 1941, was ap-

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[37]Appendix "A," pp. 19-24.

[38]*Consolidated Milk Producers v. Parker*, 19 Cal. (2d) 815.

proved by the Governor June 16, 1941, and became effective September 13, 1941.[39]

During this period, in an effort to achieve a perfect solution of this problem in co-operation with the Federal Government, a joint resolution was offered in the State Senate April 7, 1941, memorializing Congress to enact legislation making the California minimum milk prices the minimum prices for the Federal enclaves within the respective milk market areas within the State. This joint resolution was adopted by the State Legislature April 28, 1941.[40]

This resolution recites the policy and objective of the State system of minimum milk prices payable to producers, distributors and to retailers of milk; the necessity and urgency fof such system of milk price control; the increasing extent of the practice of selling milk by California distributors to the Federal Government at places ceded to or owned by the United States at less than minimum wholesale and retail prices established for California milk marketing areas; the disastrous effects of such practice upon the State's statutory scheme for stabilization of the basic milk business, and the urgency for correcting the situation.

We have attached this resolution to this brief as Appendix "B."

There can be no doubt, therefore, concerning the legislative determination of the public necessity for reaching a situation affecting California milk producers, distributors, retailers and consumers.

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[39]Stats. 1941, Chap. 1214, p. 3008.
[40]Stats. 1941, Chap. 65, p. 3402.

By the addition of these three subdivisions, California sought to safeguard its milk supply for the benefit of the inhabitants within its boundaries, whether they were subject to its jurisdiction or not, by insuring the payment to producers of an amount adequate to permit them to maintain production.

Subdivision (6) seeks to protect the *producer* price by prohibiting the distributor from purchasing, processing, etc., the milk within the marketing area unless he receives the established resale price for that area which the State has found to be necessary to enable him to pay the producer price and recover his essential costs of distribution. This applies throughout the geographical limits of the marketing area whether the distributor sells the milk within a Federal enclave or not. It will be noted that the Government or any parties within the Federal enclave may obtain milk from any other source without any so-called interference or repercussions from this subdivision. And stores or other agencies within the enclave may sell at any prices whatsoever. The State is concerned *only* with seeing that a distributor whom it licenses to do business within its jurisdiction does not use that license to obtain its milk and dispose of the same at such a loss that the distributor cannot pay the producer his minimum price.

Subdivision (7) simply requires a distributor to pay the minimum price to the producer regardless of whether he sells the milk to the Federal, State or local government. It may be argued by appellant that this subdivision amply protects the producer price. But this alone is just as inadequate as the original 1935 law was found to be until the distributors' resale prices were added in

1937. It only "locked the barn door after the horse had been stolen" and would be simply another instance of "too little—too late."

Subdivision (8) provided the necessary protection for milk moved from one marketing area to another or into portions of the State where no marketing areas had yet been designated.

Thus, subdivision (6) is but giving effect to the basic objective of the statute—to safeguard the milk supply produced within the State by insuring to the producer the essential cost of his production. The State is not concerned with establishing milk prices within Federal territory and has refused to attempt to do so. Its concern is that the distributor obtain a sufficient price to insure payment to the producer.

Such a law is not peculiar to California, alone. Many states have enacted similar laws. Our Federal Government, itself, has recognized the absolute necessity of such production and has sought to achieve the same basic objective in the Federal Agricultural Adjustment Act, as amended.[41] Under this it has established several milk marketing areas where the milk was brought in through interstate commerce. Both the Federal act[42] and the State law[43] authorize and provide for co-operation between the Federal and State governments in achieving the common basic objective of these two enactments.

Furthermore, in the instant case, the Federal Government is just as dependent upon the California milk supply

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[41] 7 U. S. C. A. 608c(5).

[42] Appendix "C," p. 99. (bid 114)

[43] Appendix "D," p. 100. "A" p 73 Sec. 735.8

to provide milk for Moffett Field and all its other enclaves within that State as is the State, itself. And it is, or should be, just as concerned as California in insuring such an adequate supply of pure and wholesome milk.

It should not seek to repudiate in its own practice the very principle which it not only preaches but enforces in commerce between the states.

Practically (although not necessarily) subdivision (6) will result in imposing to a considerable extent the State minimum wholesale milk prices upon the Federal enclaves situated within the geographical limits of the several milk marketing areas within the State.

The question then, to use the language of this Court in *Osborn v. Ozlin*, 310 U. S. 53, 62, is whether California "has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere."

Is there any "constitutional restriction" against the policy here adopted? Has the Constitution "placed control elsewhere"? These are the questions which must be answered here. As stated by Chief Justice Shaw in *Norris v. Boston*, 4 Metc. (Mass.) 282, 292-3 (1842):

> "In considering, therefore, whether it is competent for a state to pass any particular law, we look rather to the ends to be attained, than to the particular enactments by which they are reached."

There is no contention here that the object sought to be attained is not legitimate nor that the means selected do not have a real and substantial relation to that object nor that the statute is unreasonable, arbitrary, capricious,

or discriminatory. This, the Court has repeatedly held, is all that the guarantee of due process demands.

We are concerned, therefore, only with the inquiry whether the act of a distributor in purchasing, processing, etc., milk within the jurisdiction of the State and within the jurisdiction of a milk marketing area thereof, under contract or arrangement or purpose to sell for prices less than the established prices in the area, constitutes in and of itself an act fairly related to the attainment of the objectives or enforcement of the Milk Control Law.

That it does constitute such an act is clear when we consider that the incidence of the statute is upon the distributor, and not upon the Federal Government or other ultimate vendee of the milk, and that the mischief with which the State is concerned is, not the payment by the Federal Government or other ultimate vendee of less than established prices, but rather the distribution by the distributor, that is, his purchasing, processing, etc., of fluid milk within the area under arrangements resulting in the receipt of prices which are insufficient to cover the necessary costs of production and distribution.

We have appended hereto the pertinent portions of the Schedule of Minimum Wholesale prices for the Santa Clara Marketing Area, issued by the Director of Agriculture effective October 24, 1941 [Appendix "C"] and also a "Report by the Bureau of Markets regarding the method used to determine the cost of distributing fluid milk to agencies of the Federal Government for the Santa Clara County Marketing Area" [Appendix "D"].

The schedule fixes the minimum wholesale price of milk of 4% or less milk fat content in half pint con-

tainers at 4¢. Agencies of the Federal, State and local governments are allowed discounts of up to 12½%, based on the volume of monthly sales.[44] In this particular case the monthly sales total on fluid milk was between $3,000 and $5,000 and the allowable discount under the schedule was 10%, making the price to the army 3.6 cents.

In arriving at the cost of distributing milk to agencies of the Government items such as cost of collectors, bad debt expense, selling expenses and advertising expense were eliminated. Notwithstanding the elimination of those items the total raw product cost for Government, sales, plus operating expenses for this type of distribution, was found to be 3.3812 cents[45] per half pint, excluding any return on the distributor's investment.

Appellant agreed to furnish half pints at 2.5 cents with a further discount of 5%, or 2.375 cents per half pint. It is at once apparent that according to the costs of distribution as determined by the Department of Agriculture, appellant, when it contracted to sell milk to the Government at 2.375 cents per half pint, was doing business at a substantial loss. This would be bound to result in eventual insolvency and consequent inability to pay to the producer or producers from whom it purchased the milk the prices fixed by the stabilization plan, thus defeating the entire purpose of the statute. The whole theory of the statute is that distributors and producers must receive at least the minimum prices fixed in order that they may avoid insolvency, remain in business and

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[44]Appendix "C," p. 107.

[45]Appendix "D," p. 110.

thus to assure an adequate supply of pure milk. To permit a distributor to do business at a loss brings about the very evil that the statute was designed to correct and destroys its very foundation.

It is obvious that the purchasing, processing, bottling, transporting or other handling of fluid milk by a distributor within a marketing area under arrangements for ultimate receipt beyond the area of less than his reasonable costs of distribution, as determined by the Director of Agriculture after investigation and public hearing, is just as mischievous and destructive as far as the purposes of the statute are concerned as similar acts of distribution for ultimate sale within the area at prices less than the distributor's reasonable costs of distribution.

In other words, the State is not concerned particularly with where the milk is ultimately sold or disposed of, or to whom the milk is ultimately sold. Its sole concern is that the distribution of the milk within the area, including all phases of distribution, shall be under arrangements for the receipt ultimately of prices wholesale or retail, sufficient to cover the reasonable costs of such distribution.

A distributor who purchases, transports, processes or bottles milk within the area under such arrangements for the sale thereof at less than the minimum prices fixed by law for the area within which such distribution occurs runs counter to the essential theory of the Milk Control Law.

That law is based upon the theory that producers must receive from distributors' prices sufficient to cover the costs of production and to keep them engaged in the

essential production of milk with some degree of solvency, and upon the further theory that, in order to accomplish this purpose with respect to producers, distributors must, in and about all of their acts of distribution, operate under price arrangements that will enable them to meet and pay such fair prices to producers. A distributor who, in the course of any of the phases of distribution, ranging from purchase of milk at the dairy and on through processing, bottling and transporting, operates under arrangements that tend to disable him from maintaining his ability in this regard, strikes at the roots of the milk stabilization system.

In view of these facts, how can it be justly said that the State of California cannot legislate to safeguard the milk stabilization system by reaching such distributor in the course of any of his acts of distribution, regardless of where or to whom the milk is to be or is sold.

The destination of the milk is an indifferent circumstance as far as the purpose of the State is concerned.

Nor is this a case where the right of the State to regulate the milk business is "used as a part of a scheme to accomplish a forbidden result."

Fidelity and Deposit Co. v. Tofoya, 270 U. S. 426. 434.

California's interest in the matter here sought to be regulated is clear. The maintenance and protection of the public health through the adequate and continuous supply of pure milk is a matter of vital and local public concern. And it is her only concern. California's purpose is not to regulate the Government nor to place a burden upon the Government nor to interfere in any

way with any function of the Government. If any of these things occur they are but incidental to a valid exercise of the police power. The legislation is not aimed at the Federal Government but rather is designed to meet a local situation which if left unregulated presents a menace to the entire milk supply of the State.

In *Nebbia v. New York*, 291 U. S. 502, 521, this Court stated that "save the conduct of railroads no business has been so thoroughly regimented and regulated by the State of New York as the milk industry."

The same is true of California. As early as 1872 San Francisco enacted an ordinance prohibiting the feeding of cows on still slops and the sale of milk from cows so fed and from sick or diseased cows.

Johnson v. Simonton, 43 Cal. 242.

Since that time the milk industry has been progressively subjected to an ever increasing measure of control until every conceivable phase of the industry has been regulated to a greater or less degree. An entire Division of the Agricultural Code consisting of innumerable sections is devoted to milk and milk products and nearly all of this legislation has for its purpose the protection of the public health. The regulation of the milk business is one which is, and has always been "traditionally local."

Allen Bradley Local No. 1111 v. Wisconsin Employment Relations Board, 315 U. S. 740, 749.

The subject is "peculiarly one of local concern" and from its nature belongs to the class with which the

State may appropriately deal in making reasonable provisions for local needs.

Simpson v. Shepard, 230 U. S. 352, 402.

It is clear that the legislation under attack is directly concerned with the protection of the public health and welfare, a matter clearly within its police power, and hence under no circumstances can be regarded as a scheme to accomplish a forbidden result.

C. A State May, in the Exercise of Its Police Power, Legislate in Respect to Acts Done Within Its Jurisdictional Limits, Regardless of Whether Such Acts May Be Part of a Transaction Originating or Culminating Beyond Its Jurisdictional Limits, Whenever the Acts Dealt With Are Such as to Reasonably Require Prohibition or Control in Order to Effect a Proper Police Policy of the State or the Enforcement Thereof.

In *Mirkovitch v. Milnor*, 34 Fed. Supp. 409, 411 (September, 1940), considered and decided by a three-judge Federal District Court, the plaintiff questioned the validity of a provision of the Fish and Game Code of California. Section 11.10 of that code provided in substance that no person shall use or operate in this State or its waters any boat, used in connection with fishing operations, irrespective of its home port or registry, which boat delivers to any point or place other than within this State any fish caught in such boat in the waters of the Pacific Ocean within this State or on the high sea or elsewhere, unless a permit authorizing the operation of such boat shall have been issued by the Fish and Game Commission.

There, as here, the acts affected by the statute occur within the State's jurisdiction, but the part of the transaction giving rise to the offense occurs beyond that jurisdiction.

The Court held that the statute was a valid exercise of the police power of the State over the operations of such boat within State waters and that the statute was not an illegal attempt by the State to extend its legislation beyond the boundaries of its jurisdiction.

The Court pointed out in its opinion that the law in question related solely to the operation within State waters of fishing vessels engaged in delivering their catch outside the State and regardless of where the fishing occured. The Court further pointed out that the object of the enactment was not to affect fishing operations beyond the State's jurisdiction, but rather to protect and conserve the State's fisheries from possible depletion and waste by virtue of uncontrolled taking of fish from waters of the State to points beyond its jurisdiction.

Further, the Court pointed out that, although the plaintiff might find himself unable to carry on his fishing operations beyond the State's jurisdiction without entering and operating his boat within State waters, the statute would not be for that reason void in making it necessary for him to apply for a permit so to do, if the provisions of the law requiring such permit were sustainable as a proper exercise by the State of its police power in the conservation of its fisheries. The Court said:

"* * * Section 1110 of the Fish and Game Code does not purport, by its terms, to forbid or

control fishing operations beyond the State's jurisdiction. * * *

"* * * The statute cannot be fairly construed, on its face, to be an illegal attempt by the state to extend its legislation beyond the boundaries of its jurisdiction, since it clearly appears therefrom that the acts prohibited without, and allowed with, a permit, are acts which are to be performed within the territorial jurisdiction of the state. * * *"

"* * * Unless all fishing boats within state waters which deliver their catch beyond the state's jurisdiction are brought within the operation of Section 1110 of the Fish and Game Code, it is apparent from the nature of things that there can be no effective control over those boats whose operations within state waters tend to impede the administration and enforcement of the state's fish and game laws and tend to the depletion and waste of its fish supply. * * *"

The same principle has been applied by the Supreme Court of the United States in *Bayside Fish Co. v. Gentry*, 297 U. S. 422, 426 (October, 1935), wherein the Court sustained the validity of a portion of the Fish and Game Code of California regulating the canning, curing, preserving or packing of fish taken from the waters of the State or brought into the State in a fresh condition. The Court said:

"* * * Sardines taken from waters within the jurisdiction of the state and those taken from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates

as a shield against the covert depletion of the local supply, and thus tends to effectuate the policy of the law by rendering evasion of it less easy. *Silz v. Hesterberg,* 211 U. S. 31, 39-40."

The Court also stated that "If the enforcement of the act affects 'interstate or foreign commerce,' that result is purely incidental, indirect and beyond the purposes of the legislation."

In *Skiriotes v. Florida,* 313 U. S. 69, 61 S. Ct. 924, 85 L. ed. 1183 (April, 1941), a Florida citizen was prosecuted under a State statute making it unlawful to use diving apparatus in taking commercial sponges from waters within the territorial limits of the State, defined as nine nautical miles from the shoreline. It was contended that this definition of the territorial limits of the State was invalid, had never been approved by Congress and that the extent of the territorial limits of the State was three miles from the shoreline and that, therefore, the State had transcended its power because the statute attempted to reach operations of the defendant inimical to the interests of the State but outside the territorial waters of the State.

Chief Justice Hughes, upholding the defendant's conviction under the statute, said:

"* * * Even if it were assumed that the locus of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the prescribed divers' equipment at that place. No question as to the authority of the United States over these waters, or over the sponge fishery, is here involved.

> No right of a citizen of any other State is here asserted. The question is solely between appellant and his own State."

It will be observed that the Court, in the above case, went a great deal further than is necessary in the case at bar. It held that, even if the locus of the offense denounced by the statute was on the high seas beyond the limits of the State, the State could govern the conduct of its own citizens at such place with respect to matters in which the State had a legitimate interest and where there was no conflict with acts of Congress.

In the case at bar, however, the locus of the offense, to wit, the unfair trade practice with which petitioner has been charged in the departmental complaint, is not within a place beyond the jurisdictional limits of California, but wholly and entirely within the jurisdictional limits of the State of California and its milk marketing area.

In *Alaska Packers Association v. Industrial Accident Commission, etc.*, 294 U. S. 532, this Court held the California Workmen's Compensation Act applicable to an injury sustained in Alaska by a workman who had entered into a contract of employment in California to work for the packer in Alaska during the salmon canning season. The court pointed out the seasonal nature of the occupation and to the fact that without a remedy in California the workmen would be remediless and there was a danger that they would become public charges. These matters the Court stated were of grave public concern to the State. The Court held that:

> "the power of a state to effect legal consequences is not limited to occurrences within the state if it has control over the status that gives rise to those con-

> sequences * * *. Objections which are founded upon the Fourteenth Amendment must, therefore, be directed, not to the existence of the power to impose liability for an injury outside state borders, but the manner of its exercise as being so arbitrary or unreasonable as to amount to a denial of due process."

Here the State had control of the status of appellant as a licensed distributor of milk and it was that status which gave rise to the consequences complained of. Appellant's objection that it is being deprived of due process by reason of the alleged attempt to exercise power over a subject matter not within its constitutional jurisdiction must therefore be directed, not to the existence of the power, but rather to the question as to whether its exercise is so arbitrary and unreasonable as to amount to a denial of due process.

However, appellant nowhere complains that the State's action is arbitrary or unreasonable. As already pointed out the statute is directed at a situation of local and public concern, and as shown elsewhere herein, the state itself and its political subdivisions are required to pay the prices for milk fixed by the director.

> "The guarantee of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the object sought to be attained."
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> *Nebbia v. New York*, 291 U. S. 502, 525.

The California statute here involved meets that test.

In *Osborn v. Ozlin*, 310 U. S. 53, 62 (Oct., 1939), this Court upheld the validity of a Virginia statute requiring

that insurance of casualty and surety risks in Virginia shall be through legally constituted and resident agencies of the companies and that such resident agent should receive the usual and customary commission on such contracts and should not share more than one-half of a commission with a non-resident broker.

Answering the contention that the State had no power to regulate or penalize the making, beyond its borders, of contracts of insurance upon persons or property located within the State by forcing a commission to be paid to a resident agent, the Court said:

> "But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. * * * Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere * * *
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> "Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it."

The Court proceeded to hold that the requirement of the statute for the placing of such insurance through an agency resident in Virginia bore a reasonable relationship to the regulation by the State of the integrity of the conduct of the business of insurance within the State of Virginia.

In the case at bar distributors purchasing, processing, etc., milk within the jurisdictional limits of California, under arrangements insufficient to meet the distributors' reasonable costs as reflected in the minimum prices established by the Director of Agriculture for the area are performing acts within the State so closely related to the legitimate interests of the State as to permit, indeed to require, the attention and control of the State, regardless of the ultimate destination of the milk.

In cases dealing with the applicability of minimum milk price regulations to distributors engaged in selling milk to various instrumentalities of the Federal Government, it has been held that such regulations were not rendered inapplicable to distributors so engaged merely because the effect was to prevent agencies of the Federal Government from purchasing milk at less than prices established as reasonable and necessary by the State in the course of its regulation.

In *Milk Control Board v. Gosselin's Dairy*, 301 Mass. 174, 16 N. E. (2d) 641, the Court held that an order of the Massachusetts State Milk Control Board establishing minimum prices for the sale of milk to sales of milk to a United States Government Veterans' Hospital which happened to be located upon and within the jurisdictional limits of the State.

Although the above case would not support an attempt on the part of the State of California to fix the price at

which milk sales or deliveries might be made in a federal area such as Moffett Field or the San Francisco Presidio, we maintain that the case does fully support the proposition that the State in the exercise of its police power can by appropriate legislation, such as the 1941 addition to section 736.3 of the Agricultural Code, reach acts of milk distributors occurring within the jurisdiction of the State, even though the practical effect of such statute is to interfere to some extent with the functioning of an instrumentality of the United States.[46]

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[46]The Court said:

"It is conceded of course, fully and ungrudgingly, that a State cannot attempt to regulate an instrumentality of the United States or impose burdens upon it which interfere with its operation and efficiency. On the other hand we apprehend that an institution of the Federal Government situated within a State cannot wholly escape every consequence arising from a fact so pervasive and insistent as is the fact of location in the midst of a civilized community whose orderly existence and continuance are derived from and supported by another sovereignty of general powers. In this case certain facts stand out. The legislation of this Commonwealth is not directed against the veterans' hospital at Northampton. If the objects stated in the preamble are realized that hospital will benefit in common with the community in general. Conversely, if dealers are to be free to ignore the law in dealing with the hospital, the whole plan will suffer proportionately. There is no discrimination against the hospital. It can buy milk as others buy milk and at any price which competition may fix not lower than the established minimum. No burden upon it can result, even indirectly, which does not likewise fall upon all users of milk, including institutions of this Commonwealth of comparable nature. No attempt is made in the law, or in the order of the board, or in this litigation to control or to give any order or direction to the veterans' hospital or to any of its officers. The incidence of the law is upon dealers in milk. Although enforcement of the law against such dealers may in fact affect the price of milk to the hospital as well as to others, yet that result is in its nature incidental and collateral rather than immediate and direct. No doubt a careful search would reveal many statutes enacted for the protection of the people of this Commonwealth against fraud, disease, accident or other evils

D. THE ONLY ALLEGED BURDEN ON THE GOVERNMENT IS THAT OF INCREASED COST WHICH UNDER THE AUTHORITIES DOES NOT CONSTITUTE AN UNCONSTITUTIONAL BURDEN OR INTERFERENCE.

It may be true that as a result of the regulation the Government will be unable to purchase milk at prices less than those which other consumers will be required to pay,

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the enforcement of which no less certainly has the effect of raising prices paid by Federal agencies. * * *

"Instrumentalities of the Federal government are constantly increasing in number and importance throughout the several States. Their contracts with the surrounding inhabitants of the States are constant and innumerable. If residents of the States are to be released from their obligations to obey State laws whenever in the course of these contracts it is for the moment advantageous to the Federal agency that they should be released, the time may arrive when in the aggregate the encroachment upon the public order of the States will become substantial. And in this connection it should also be remembered that the Federal agencies may seldom have complete power and will almost never be under the obligation to establish new regulations for the protection of the public in place of those which, in so far as concerns them, they set aside."

See, also:

Paterson Milk and Cream Co., Inc. v. Milk Control Board, 192 Atl. 838, 118 N. J. Law. 383 (involving applicability of minimum milk price regulation to distributors supplying Federal agency);

James v. Dravo Construction Co., 302 U. S. 134, 160 (Oct., 1937). (involving applicability of State gross receipts tax to an independent contractor engaged in work for the Federal Government);

Stewart and Co. v. Sadrakula, 369 U. S. 94, 104 (involving applicability of State building and construction statute to a contractor engaged in work for an instrumentality of the Federal Government);

Alabama v. King and Boozer, 62 S. Ct. R. 43, 314 U. S. 1 (involving sales tax on persons having cost-plus-a-fixed-fee contracts with the Government to construct an army camp);

Baltimore & A. R. Co. v. Lichtenberg, 176 Md. 383, 4 Atl. (2d) 734 (1939), appeal dismissed for want of substantial Federal question, *sub nom U. S. v. Baltimore & Annapolis R. R.*, 308 U. S. 525, 60 S. Ct. 297, 84 L. ed. ..... Cited in *Stewart v. Sadrakula, supra* (involving applicability of New York Labor Law on Federal post office site).

but that is merely an incidental result flowing from the valid exercise of the State's police power.

It was contended in the state court that if this action had not been filed the performance of the petitioner's contract with the Government would have been directly interfered with and interrupted by the action of the State Department of Agriculture, and further, that respondent seeks to withdraw from the United States access to necessary supplies with which to feed its troops unless the terms of the Act are first complied with.

The fears thus expressed are more apparent than real. The fact is that in every case where the Government has called for bids (at least to the date of the commencement of this proceeding) a number of distributors have presented bids. There is no suggestion in the record, nor can it be contended, that the United States would be deprived of access to necessary supplies with which to feed its troops. The supply is, and has been at all times up to the present, adequate to take care of the needs of the Government and had petitioner's contract been interfered with by the Department of Agriculture there were, and are, other distributors ready and able to supply the Government with the milk it needs.

It is evident therefore that the only alleged burden upon the Government is that of increased cost. But this burden, it was contended, is neither theoretical nor speculative, but is actual and substantial.

That the amount involved over a period of time in the various military reservations situated in this State will be substantial is not denied. In the instant case, alone, the amount is negligible. However, the question is not whether it is substantial in that sense but whether the alleged

burden is unreasonable so as to constitute an unconstitutional interference with governmental functions.

In reckoning the incidental increased cost of milk to the Government by reason of the state regulation the benefits derived from that regulation should also be taken into account. As we have pointed out, the Milk Control Law is a health measure, the ultimate design and purpose of which is to insure an adequate and continuous supply of pure and healthful milk. If the purpose of the statute is maintained there can be no question that the Government in common with all other consumers will share the benefits. If the purpose of the statute is defeated, the Government will likewise share the consequences of such defeat. If distributors are to be released from the obligation of conforming to the price regulations because for the moment it appears advantageous to the federal agencies that they should be released, the very conditions which the statute was designed to prevent will again arise. Distributors will engage in cut-throat competition which will assuredly result, as it has in the past, in their inability to pay producers. Producers in turn will be forced to relax their sanitary standards or will be forced out of business altogether. Both the quality and quantity of the public milk supply may suffer to such an extent as to actually interfere with the governmental functions of the United States. While it might appear that under the State regulations the Government will presently be required to pay more for its milk, surely in the long range view of the matter it will be to the benefit and advantage of the Government, financially and otherwise, to have the regulation maintained.

The Government in procuring its milk for Moffett Field, the same as for all its other enclaves in California,

depends upon that State to protect the sanitary conditions, purity and wholesomeness of that milk by means of adequate regulation. If in the instant case the milk in question had come from tubercular cows or contained an excess bacteria count, the Government would have depended upon the State to prevent appellant from delivering such milk and would have blamed the State if it had failed to give such protection. All such sanitary regulations entail additional costs which add that much to the price the Government as well as any other consumer must pay for milk.

We venture to say that not for one minute would any claim have been made that appellant was free from such regulation and could handle and deliver such impure and infected milk because he was selling the same to the Federal Government and in a federal enclave. There is no difference in principle between such sanitary requirements and subdivision (6) so far as federal immunity is concerned.

Congress has not seen fit to provide adequate or any sanitary regulations to prevent delivery of impure milk in the federal enclaves in California nor any enforcement machinery to protect its milk supply, but has left the State free, and in fact depended upon it, to supply the protection.

To leave all those engaged in supplying milk to federal enclaves free from all state regulation would create a conditon of anarchy in the milk industry and subject the entire milk supply of the State to contamination. Such a situation is beyond contemplation.

The mere fact that the regulation may increase the cost to the Government does not invalidate the State statute.

Such is the holding of this Court in the more recent decisions.[47]

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[47] In *James v. Dravo Contracting Company*, 302 U. S. 134, at 160-1, the court said:

> "But if it be assured that the gross receipts tax may increase the cost to the Government, that fact would not invalidate the tax. With respect to the effect, a tax on the contractor's gross receipts would not differ from a tax on the contractor's property and equipment necessarily used in the performance of the contract. Concededly, such a tax may validly be laid. Property taxes are naturally, as in this case, reckoned as a part of the expense of doing the work. Taxes may validly be laid not only on the contractor's machinery but on the fuel used to operate it. In *Trinityfarm Construction Co. v. Grosjean*, 291 U. S. 466, the taxpayer entered into a contract with the Federal Government for the construction of levees in aid of navigation and gasoline was used to supply power for taxpayer's machinery. A state excise tax on the gasoline so used was sustained. The Court said that if the payment of the state taxes imposed on the property and operations of the taxpayer 'affects the federal government at all, it at most gives rise to a burden which is consequential and remote and not to one that is necessary, immediate or direct.' But a tax of that sort unquestionably increases the expense of the contractor in performing his service and may, if it enters into the contractor's estimate, increase the cost to the Government. The fact that the tax of the gross receipts of the contractor in the *Alward* case, *supra*, might have increased the cost to the Government of the carriage of the mails did not impress the Court as militating against its validity."

In *Alabama v. King and Boozer*, 62 S. C. R. 43, 314 U. S. 1 (1941) the Court held that the Alabama sales tax as applied in connection with sales to persons having "cost-plus-a-fixed-fee" contracts with the United States to construct an army camp did not infringe any constitutional immunity of the United States.

The Court said in part:

> "So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties."

See also *Curry v. United States*, 62 S. C. R. 48 (Companion case to *Alabama v. King and Boozer, supra*, where the court said:

> "If the State law lays a tax upon them (contractors) rather than the individual with whom they enter into a cost-plus contract like the present one, then it affects the Government, like the individual, only as the economic burden is shifted to it through the operation of the contract."

So far as an unconstitutional burden upon, or interference with, a governmental function is concerned there is no distinction between such burden or interference imposed by a tax statute and one imposed by a regulatory statute.

The principal in either case is the same. That this is true appears to be clear from the case of *Stewart and Company v. Sadrakula*, 309 U. S. 94, where the court held a State police statute relating to the protection of employees on building construction applicable to a contractor engaged in the construction of a postoffice upon Federal territory. There, as in the tax cases, it was argued that the safety requirements of the statute would result in increasing the cost of construction to the Government.[48]

The more recent cases clearly establish the proposition that the mere incidental effect of increasing the price of milk to the Government does not operate to invalidate the statute.

E. The State Statute Does Not Run Counter to the Federal Bidding Statutes.

The contention has also been made that the State's price fixing authority cannot constitutionally be applied to Gov-

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[48]The court said (p. 104):

"In answer to the argument that a similar increased cost from taxation would 'make it difficult or impossible' for the government to obtain the service it needs, we said in James v. Dravo Contracting Co. that such a contention 'ignores the power of Congress to protect the performance of the functions of the National Government and to prevent interference therewith through any attempted state action.' Such a safety requirement is akin to the safety provisions of Maryland law which in Baltimore & Annapolis Railroad Co. v. Lichtenberg were held applicable to trucks of an independent contractor transporting government employees under a contract with the United States."

ernment purchases because to do so would conflict with Federal statutes requiring competitive bidding. (10 U. S. C. A. 1200 and 1201.)

The State Court pointed out that the Federal statute requires competitive bidding except in cases "where it is impracticable to secure competition."

The State Court also appears to have relied to some extent upon army regulation 5-240(g) to the effect that it is impracticable to secure competition "(3) when the price is fixed by Federal, State, Municipal or other competent authority". In the "Statement as to Jurisdiction" filed by appellant herein attention is called to the fact that the above mentioned regulation has been amended and the subsection (3) quoted by the court has been omitted. However, it does not appear that the court attached any great significance to that regulation or that its decision would have been otherwise had it been aware of the amendment.[49]

The same contention was urged by the Government in the *Penn Dairies* case and was rejected by the Pennsylvania court without any reference to the army regulation. The court quoted from *United States v. Brookridge Farm, Inc.* (10 Cir.) 111 F. (2d) 461, 463, as follows:

> "The purpose of these statutes and regulations is to give all persons equal right to compete for Govern-

[49] Prior to referring to the army regulation the court stated "The California Milk Control Act does not discriminate against the United States Army or substantially hinder its efficient operation. The army is not precluded from obtaining milk, nor required to pay more for such milk than other consumers in the same area. The act regulates not the army but the distributors who are independent contractors with the federal government. It is settled that such contractors are subject to state control, and that any consequent burden on the federal government is speculative and remote." (Citing cases.) [R. 25-6.]

ment contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition."

The court then went on to say that "The Milk Control Law contravenes neither the language of the statutes nor any of the above stated purposes. It does no more than put all bidders on an equal footing with regard to the minimum price and, as already pointed out, its primary purpose is to assume *responsibility* with all that the word implies."

The statute fixes only minimum prices and prior to the price freezing order of the O. P. A. distributors were permitted to bid any price they wished above such minimum prices.

The fact that due to competition in the industry a number, or all, of the bidders might submit identical bids on fluid milk is merely an incidental circumstance. It in no way interferes with the right or duty of federal officers of calling for bids.

Moreover the usual situation is that which was presented in the instant case, namely, that the invitation for bids includes not only milk, but also includes ice-cream, cottage cheese, buttermilk and the like, upon which prices are not fixed. In such a case the contract would be awarded to the distributor submitting the lowest aggregate bid on all the commodities called for in the invitation. It is clear therefore that the statute does not contravene the federal bidding statutes even if it be assumed that the latter require bidding where state statutes fix minimum prices.

IV.

The Ruling of the California Supreme Court That Commerce Between Moffett Field and "the Rest of the State" of California Is Interstate Commerce Was Unnecessary. In Any Event the State Statute Does Not Run Counter to the Commerce Clause of the Federal Constitution.

In this case the petitioner did not in its petition or otherwise contend that the California statute is in any manner violative of the Commerce Clause of the Constitution. This question was raised by the Court *sua sponte*. The parties were asked to submit briefs on the question as to whether milk shipped from California into Moffett Field is in interstate commerce and if it is, does the Agricultural Marketing Agreement Act of 1937 (50 U. S. Stats. 246) preclude the application of the California Milk Control Act to sales of milk in Moffett Field.

Counsel for the petitioner took the position that the question of interstate commerce was *not involved* in this proceeding.[50] However, the United States Attorney, as *amicus curiae*, took the position that commerce between a State and Federal territory situated within the geographical boundaries of the State constitutes interstate commerce.

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[50]In its "Additional Authorities on Petition for Writ of Mandamus" petitioner on page 2 thereof stated: "So the question of interstate commerce is not involved in our discussion of the present case and the Agricultural and Marketing Agreement Act of 1937 of the United States as far as military reservations are concerned, would be regulatory by the Government of its own territory, and not a regulation of interstate commerce."

Notwithstanding that this question was not an issue in the case and that a ruling thereon was unnecessary to the decision the Court proceeded to discuss the question and held that the power of Congress to regulate interstate commerce enables it to regulate commerce between such areas as Moffett Field and "the rest of the State" of California. The Court went on, however, to hold in substance that while such commerce could be regulated under the Commerce Clause the power so to do had not been exercised and that until such time as the Federal Government undertook to do so the State was free to regulate such commerce.

Since this whole question was not an issue in this proceeding the Court's discussion must be regarded merely as dictum, and it is very questionable whether this Court ought now to pass upon it. In this connection we refer the Court to the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Valley Authority*, 297 U. S. 288, at 346-347, and authorities there cited, setting forth a series of rules developed by the Court for its own goverance in cases confessedly within its jurisdiction, under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. Whether any of these rules are applicable to the present situation we leave to this Court to decide. We merely reiterate that the interstate commerce question was injected into the proceeding by the State court and not by the petitioner and further that after it was injected petitioner took the position that no question of interstate commerce was involved in the case.

Inasmuch as the Secretary of Agriculture has failed to establish any Federal milk marketing area for Moffett Field or for any other Federal enclave in California, we

take it that under the authority of *Parker v. Brown,* No. 46 this term, decided January 4, 1943, Congress having failed to occupy the field, the State is left free to act.

Moreover a realization of the number and nature of these Federal enclaves practically precludes the possibility, or at least feasibility, of such attempted Congressional regulation. Federal employees occupying offices in Federal buildings would be unable to secure deliveries of merchandise because local delivery services were without interstate commerce licenses. A hundred and one difficulties would arise to completely disrupt the ordinary and customary procedure.

The question whether commerce between a State and these Federal enclaves within the geographical boundaries is interstate commerce or not is one of vast importance to nearly every State in the Union. In view of the fact that appellant took the position in the court below that no question of interstate commerce was involved and that it has filed no brief in this appeal, and in further view of the fact that this is, so far as we know, a question of first impression in this Court, we believe that if this question is to be passed upon in this case a full opportunity to present the same should be afforded upon proper briefs filed by appellant with opportunity for respondent to reply thereto. And this, of course, becomes unnecessary in the event this Court concludes that the determination of such question is not required for a decision herein. As indicative of the scope of this problem we attach hereto as Appendix "E" a list of Federal acts applicable to interstate commerce and which would be called into consideration in every transaction moving from any part of a State into any one of these Federal enclaves.

Conclusion.

We respectfully submit that the State statute here in question does not conflict with any provision of the Federal Constitution nor with any Federal statute, but that on the contrary it is in all respects a valid and constitutional exercise of the police power of the State.

With the exception of the dictum holding commerce between the State and a Federal area within the State is interstate, the judgment of the State Supreme Court should be affirmed.

Respectfully submitted,

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EXTRACTS

FROM THE

AGRICULTURAL CODE OF CALIFORNIA

PERTAINING TO

GENERAL PROVISIONS AND STABILIZATION AND MARKETING OF FLUID MILK AND FLUID CREAM

REVISED TO SEPTEMBER 13, 1941

4543

printed in CALIFORNIA STATE PRINTING OFFICE
SACRAMENTO, 1941 GEORGE H. MOORE, STATE PRINTER

AGRICULTURAL CODE*

GENERAL PROVISIONS

Title

1. This act shall be known and may be cited as the "Agricultural Code."

Definitions

2. As used in this code, unless otherwise apparent from the context:

(a) The present tense includes the past and future tenses; and the future, the present.

(b) The masculine gender includes the feminine and neuter.

(c) The singular number includes the plural, and the plural the singular.

(d) "Department" means the Department of Agriculture of the State of California.

(e) "Director" means the Director of Agriculture of the State of California.

(f) "Commissioner" means any county agricultural commissioner.

(g) "Section" means a section of this code unless some other statute is specifically mentioned.

(h) "County" includes city and county.

(i) "Person" includes firm, corporation, company, or association.

(j) "Sell" includes "offer for sale," "expose for sale," "have in possession for sale," "exchange," "barter" or "trade."

Construction and effect

3. The provisions of this code, in so far as they are substantially the same as existing law, shall be construed as continuations thereof and not as new enactments.

4. All persons who, at the time this code goes into effect, hold office under any of the acts repealed by this code, which offices are continued by this code, continue to hold the same according to the former tenure thereof.

5. No action or proceeding commenced before this code takes effect, and no right accrued, is affected by the provisions of this code, but all procedure thereafter taken therein shall conform to the provisions of this code so far as possible.

Enforcement

6. Any person in whom the enforcement of any provision of this code is vested has the power of a peace officer as to such enforcement.

Prosecution

7. The district attorney of any county in which a violation of any provision of this code occurs shall, upon request of any enforcing officer or other interested person, prosecute

* The Agricultural Code was enacted by the Fiftieth California Legislature, being Chapter 25, Statutes of 1933, and entitled, "An act to establish an Agricultural Code, thereby consolidating and revising the law relating to plant and animal industry and the products thereof, and to repeal certain acts and parts of acts specified herein." (In effect August 21, 1933.)

Any additions to, repeals or amendments of, the provisions of the code will be indicated by reference to chapter number under which they were enacted by the Fiftieth, Fifty-first, Fifty-second, Fifty-third, and Fifty-fourth Legislatures.

such violation; and the prosecutor of any municipality has concurrent jurisdiction as to any violation committed within his territorial jurisdiction.

General penalty

8. Unless a different penalty is expressly provided, a violation of any provision of this code is a misdemeanor.

9. Whenever any notice, report, statement or record is required by this code it shall be in writing unless it is expressly provided that it may be oral.

10. Whenever any notice, report, statement or record is required by this code to be kept or made in writing it shall be in the English language.

11. Unless otherwise specifically provided, whenever any document is required or permitted by this code to be recorded it shall be recorded in the office of the county recorder of the county in which the property or thing affected is situated.

12. Whenever any power or authority is given by any provision of this code to any person it may be exercised by any deputy, inspector, or agent duly authorized by him unless it is expressly provided that it shall be exercised in person.

13. Whenever any reference is made to any section of this code or to any other law, such reference shall apply to all amendments and additions thereto.

14. As used in this code the word "shall" is mandatory, and the word "may" is permissive.

15. The director may enter upon any premises to inspect the same or any plant, appliance or thing thereon.

Rules and regulations authorized

16. The director is hereby authorized to promulgate and adopt rules and regulations for carrying out those provisions of this code which he is directed and authorized to administer or enforce.

(Added by Ch. 723, Stats. 1933.)

DIVISION 4. DAIRIES AND DAIRY PRODUCTS

CHAPTER 10. STABILIZATION AND MARKETING OF FLUID MILK AND FLUID CREAM *

(Heading added by Ch. 241, Stats. 1935.)

Article 1. General Provisions

735. (a) The production and distribution of fluid milk and of fluid cream and the dissemination of accurate scientific information as to the importance of milk and other dairy products in the maintenance of a high level of public health, is hereby declared to be a business affected with a public interest. The provisions of this chapter are enacted in the exercise of police powers of this State for the purpose of protecting the health and welfare of the people of this State. Public interest

(b) It is hereby declared that fluid milk and fluid cream are necessary articles of food for human consumption; that the production and maintenance of an adequate supply of healthful milk of proper chemical and physical content, free from contamination, is vital to the public health and welfare, and that the production, transportation, processing, storage, distribution or sale of fluid milk and fluid cream in the State of California is an industry affecting the public health and welfare; that unfair, unjust, destructive and demoralizing trade practices have been carried on and are now being carried on in the production, marketing, sale, processing or distribution of fluid milk and fluid cream, which constitute a constant menace to the health and welfare of the inhabitants of this State and tend to undermine sanitary regulations and standards of content and purity, however effectually such sanitary regulations may be enforced; that health regulations alone are insufficient to prevent disturbances in the milk industry which threatens to destroy and seriously impair the future supply of fluid milk; and to safeguard the consuming public from future inadequacy of a supply of this necessary commodity; that it is the policy of this State to promote, foster and encourage the intelligent production and orderly marketing of commodities necessary to Legislative declaration

* (NOTE.—All of the sections of this chapter changed by Ch. 3, Stats. 1937, were subject to the following sections of said Chapter 3:
SEC. 21. If any provision of this act, or the application thereof to any person or circumstance is held invalid, the remainder of this act, or the application of such provision to any other person or circumstance, shall not be affected.
SEC. 22. All stabilization and marketing plans in effect on the effective date of this act, and all rights and liabilities accruing under such plans shall not be affected by this act, but such plans may be superseded at any time by a plan formulated as prescribed in said Chapter 10 of Division 4 of the Agricultural Code as amended by this act.
SEC. 24. This act is hereby declared to be an urgency measure necessary for the immediate preservation of public peace, health and safety within the meaning of Section 1 of Article IV of the Constitution and shall therefore go into immediate effect. The statement of the facts constituting such necessity is as follows:
The economic conditions of fluid milk producers throughout the State are such as to require immediate relief if their purchasing power and taxpaying ability are to continue and their morale and standard of living are not to be undermined. Such relief can be afforded only by the orderly production and marketing of fluid milk and fluid cream. The provisions herein contained are necessary in order to prevent the further demoralization of the fluid milk and fluid cream industries.)

its citizens, including milk, and to eliminate speculation, waste, improper marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers.

(c) It is recognized by the Legislature that conditions within the milk industry of this State are such that it is necessary to establish marketing areas wherein different prices and regulations are necessary; and for that purpose the Director of Agriculture of this State shall have the administrative authority, with such additional duties as are being prescribed, after investigation and public hearing, to prescribe such marketing areas and modify the same when advisable or necessary.

Definitions (d) The foregoing statements of facts, policy and application of this law are hereby declared a matter of legislative determination.

(Added by Ch. 244, Stats. 1935; amended by Ch. 3, Stats. 1937.)

735.1. The purposes of this chapter are to:

Purposes (a) Provide funds for administration and enforcement of this act, by assessments to be paid by producers of fluid milk or fluid cream, or both, and from licenses issued to distributors in the manner prescribed herein.

(b) To authorize and enable the director to prescribe marketing areas and to determine prices to producers for fluid milk or fluid cream, or both, which are necessary due to varying factors of costs of production, health regulations, transportation and other factors in said marketing areas of this State, provided that the cost to distributors within any marketing area, for fluid milk or fluid cream shall be uniform with all other distributors purchasing fluid milk and fluid cream of similar grade or quality under like terms and conditions.

(c) To authorize and enable the director to formulate stabilization and marketing plans subject to the limitations herein prescribed with respect to the contents of such stabilization and marketing plans and declare such plans in effect for any marketing area.

(d) Enable the dairy industry with the aid of the State to correct existing evils, develop and maintain satisfactory marketing conditions, and bring about a reasonable amount of stability and prosperity in the production and marketing of fluid milk and fluid cream and provide means for carrying on essential educational activities.

It is the intent of the Legislature that the powers herein conferred shall be liberally construed. Nothing in this chapter shall be construed as permitting or authorizing the development of conditions of monopoly in the production or distribution of fluid milk or fluid cream. In the establishment of the terms and conditions under which fluid milk and fluid cream shall be purchased from producers, and under which distributors and retail stores shall sell and distribute the same, such terms and conditions shall be those which will, in the several localities and markets of the State and under the varying conditions of production and distribution insure an adequate and

continuous supply of pure fresh wholesome fluid milk and fluid cream to consumers thereof at fair and reasonable prices.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

735.2. The director shall enforce the provisions of this chapter and any stabilization and marketing plan or marketing agreement initiated pursuant to the provisions of this chapter, and for that purpose may make such rules and regulations as he deems necessary. Enforcement

(Added by Ch. 241, Stats. 1935.)

735.3. As used in this chapter:

(a) "Board" means any local control board created as herein authorized.

(b) "Fluid milk" means any and all whole milk that is produced in conformity with applicable health regulations for market milk of the place where such milk is consumed and for the purpose of this chapter fluid milk may be classified as follows:

Class 1. Any such milk that is supplied to consumers in the form of whole milk, which shall include "raw milk"; "pasteurized milk"; "homogenized milk"; "condensed milk," "evaporated milk," and "modified milk," that is prepared from whole fluid milk and which is not packaged in hermetically sealed containers; fluid milk containing added vitamins or flavoring; that portion of fluid milk used as whole milk in any combination of fluid milk and fluid cream containing a milk-fat content in excess of the minimum statutory requirements for fluid milk and less than the minimum statutory requirement for "cream," and includes milk-fat used in the standardization of Class 1 fluid milk; Classes of fluid milk

Class 2. Any such milk or the cream derived therefrom that is sold or disposed of by distributors for consumption as cream, as cream is defined in this code, including cream in any combination of fluid milk and fluid cream containing a milk fat content in excess of 6.0 per cent and less than the minimum statutory requirements for cream;

Class 3. Any such milk or the cream derived therefrom, as cream is defined in this code, that is sold or disposed of by distributors in any form not included in Classes 1, 2 or 4;

Class 4. Any such milk or the cream derived therefrom, as cream is defined in this code, that is used by distributors in the manufacture of butter and cheese other than cottage cheese.

In designating and prescribing or providing methods for designating and prescribing minimum prices to be paid by distributors to producers for Classes 2, 3 or 4 fluid milk, the director may take into consideration the market price of all milk which may be used for the same purposes set forth in such respective classes.

(c) "Fluid cream" means any and all cream defined in this code as cream and which conforms to the health and sanitary regulations of the place where such cream is to be sold or

disposed of for human consumption as cream; provided, however, that the cream derived from the separation of Class 2 fluid milk shall not be considered as fluid cream except that such cream when packaged as cream shall be subject to all of the terms and provisions of orders of the director establishing minimum wholesale and minimum retail prices for fluid cream.

(d) "Dairy products" includes any product manufactured from milk or any derivative or product of milk.

"Producer": Definition

(e) "Producer" means any person who produces fluid milk or fluid cream from five or more cows or goats in conformity with the applicable health regulations of the place in which it is sold, and whose fluid milk or fluid cream is received or handled by any distributor. "Producer" includes any association of producers.

"Distributor": Definition

(f) "Distributor" means any person, whether or not such person is a producer or an association of producers, who purchases or handles fluid milk or fluid cream for sale, including brokers, agents, copartnerships, cooperative corporations and incorporated and unincorporated associations. The definition of "distributor" shall not include any of the following: (1) Any retail store that is not engaged in processing and packaging fluid milk or fluid cream, (2) any establishment where fluid milk or fluid cream is sold only for consumption on the premises, that is not engaged in processing and packaging fluid milk or fluid cream, (3) any person owned or controlled by one or more retail stores, or owned or controlled by one or more establishments where fluid milk or fluid cream is sold for consumption on the premises which person is not actively and directly engaged in the processing and packaging of fluid milk or fluid cream, (4) any producer who delivers fluid milk or fluid cream only to a distributor.

"Producer-distributor": Definition

(ff) "Producer-distributor" means any person who is both a producer and a distributor of fluid milk or fluid cream. For the purposes of this chapter a producer-distributor shall be deemed to be a producer in any transaction involving the delivery of fluid milk or fluid cream produced by him to a distributor, and shall be deemed to be a distributor in any transaction involving the delivery of fluid milk or fluid cream to a person who is not a distributor as defined in this section.

"Retail store": Definition

(g) "Retail store" means any person or persons owning or operating a retail grocery store, restaurant, confectionery, or other similar business, where fluid milk or fluid cream is sold to the general public for consumption off the premises.

(h) "Marketing area" is any area within this State declared to be such in the manner prescribed in this chapter.

(i) "Stabilization and marketing plan" means any plan formulated and made effective by the director within the legislative standards provided by this chapter and shall include, among other things the establishing of prices to be paid by distributors for any or all of the various classes of fluid milk or fluid cream.

(j) "Consumer" means any person who purchases fluid milk, fluid cream or dairy products for consumption.

(k) "Person" means any individual, firm, corporation, association or any other business unit.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 57, Stats. 1937; by Ch. 941, Stats. 1939; by Ch. 1214, Stats. 1941.)

735.4. (a) The director shall have and may exercise any or all the powers conferred by Section 353 of the Political Code upon the head of a department of the State with respect to hearings and investigations under this chapter. Powers of director

(b) The director is hereby declared to be the instrumentality of this State for the purpose of administering and enforcing the provisions of this chapter and to execute the legislative intent herein expressed, and is hereby vested with the administrative authority:

(1) To investigate any and all transactions between producers and distributors or among distributors or between distributors and retail stores or between distributors and consumers or between retail stores and consumers, and for that purpose the director or his authorized agents shall have access to and may enter at all reasonable hours all places where milk is being stored, bottled or manufactured, or where milk or milk products are being bought, sold or handled, or where the books, papers, records or documents relating to such transactions are kept, and shall have power to inspect and copy the same in any place within the State.

(2) To issue licenses to distributors and require the registration of producers.

(3) To formulate any stabilization and marketing plan as prescribed in this chapter and declare the same effective after public hearing and reasonable notice by mail or otherwise to all producers and distributors of record with the director, affected by such plan.

(4) To prescribe minimum prices to be paid by distributors in accordance with a stabilization and marketing plan for fluid milk and classify said milk according to usage by distributors; provided, that the prices so prescribed shall be based upon the economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk, taking into consideration the additional costs incurred in producing and marketing fluid milk over and above such costs incurred in producing and marketing manufacturing milk.

(5) To prescribe minimum prices to be paid by distributors for fluid cream in accordance with a stabilization and marketing plan; provided, that the prices so prescribed shall be based upon the economic relationship of the price of fluid cream for the marketing area involved to the price of manufacturing milk, taking into consideration the additional costs incurred in producing and marketing fluid cream over and above such costs incurred in producing and marketing manufacturing milk.

(6) (a) To amend or terminate any stabilization and marketing plan, after notice and public hearing as prescribed in Section 736.1, in the event that he finds that such plan is no longer in conformity with the standards prescribed in, or will not tend to effectuate the purposes of, this chapter. Such hearing may be held upon the motion of the director and shall be held upon receipt of a petition signed by producers representing not less than 55 per cent of the total number of all producers and not less than 55 per cent of the total production of all producers who are eligible to petition the director for the formulation of such plan.

(b) To amend, after notice and public hearing called and held in the same manner as provided in Section 736.12, any minimum wholesale and retail prices established under the provisions of Article 2a of this chapter, in the event that he finds that any such price is, or that any such prices are, no longer in conformity with the standards prescribed therefor, or will not tend to effectuate the purposes of this chapter.

(c) To terminate any such minimum wholesale and retail prices without notice or hearing at any time that there is no stabilization and marketing plan in force and effect in such marketing area.

(7) To appoint a local control board for any marketing area, in the event that he deems such board necessary or advisable.

(8) To remove any member from a local control board in the event that he finds such member, after hearing, is guilty of nonfeasance or malfeasance in office.

(9) To appoint a member to fill a vacancy on a local control board.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 941, Stats. 1939; by Ch. 1214, Stats. 1941.)

735.5. A full and accurate record of business or acts performed or of testimony taken by the director in pursuance of the provisions of this chapter shall be kept and placed on file in the office of the director.

(Added by Ch. 241, Stats. 1935.)

Review 735.6. Any order of the director hereunder substantially affecting the rights of any interested party may be reviewed by any court of competent jurisdiction. Any such action must be commenced within 30 days after the effective date of the order complained of or within 30 days after the injurious effect complained of becomes reasonably apparent.

(Added by Ch. 241, Stats. 1935.)

Injunction 735.7. The director may bring an action to enjoin the violation or the threatened violation of any provision of this chapter or of any order made pursuant to this chapter in the superior court in the county in which such violation occurs or is about to occur. There may be enjoined in one proceeding any number of defendants alleged to be violating the same provisions or orders, although their properties, interests, residence, or place of business, may be in several counties and the

violations separate and distinct. Any proceeding brought hereunder shall be governed in all other respects by the provisions of Chapter 3 of Title 7 of Part 2 of the Code of Civil Procedure.

(Added by Ch. 241, Stats. 1935.)

Other powers of director

735.8. The director may confer, enter into agreements, or otherwise arrange with the constituted authorities of this State, other States, or agencies of the United States with respect to plans relating to the stabilization and distribution of fluid milk and fluid cream within this State or as between this State and other States or the United States, and may exercise his powers hereunder to effectuate and enforce such plans.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Moneys

735.9. All money received by the director hereunder shall be paid monthly into the State Treasury to the credit of the "Department of Agriculture Fund."

(Added by Ch. 241, Stats. 1935.)

Article 2. Stabilization and Marketing Plans

(Heading amended by Ch. 3, Stats. 1937.)

Designation of milk marketing areas

736. As soon as possible after the effective date of this chapter the director shall designate marketing areas which he deems necessary or advisable to effectuate the purposes of this chapter, and wherein he finds the conditions affecting the production, distribution and sale of fluid milk, fluid cream or both are reasonably uniform. The director shall have the power to establish additional areas or to modify areas theretofore established when he deems the establishment or modification of such areas necessary or advisable to effectuate the purposes of this chapter.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Hearing procedure—Stabilization and marketing plan

736.1. The director shall, prior to the formulation of a stabilization and marketing plan for fluid milk for any marketing area, conduct a public hearing in said area for the purpose of determining whether or not producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area and who represent not less than 65 per cent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who produce not less than 65 per cent of the total volume of the fluid milk produced for said marketing area by all such producers, desire that a stabilization and marketing plan for fluid milk be formulated for said area; but if a petition is presented to the director by the producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area, and who represent not less than 65 per cent of the total number of producers whose major interest in the fluid milk business is in the production of fluid milk for the marketing area and who produce not less than 65 per cent of the total

volume of the fluid milk produced for said marketing area by all such producers, it shall not be necessary that such hearing be held.

The director shall, prior to the formulation of a stabilization and marketing plan for fluid cream for any marketing area, conduct a public hearing in said area for the purpose of determining whether or not producers whose major interest in the fluid cream business is in the production of fluid cream for said marketing area and who represent not less than 65 per cent of the total number of producers whose major interest in the fluid cream business is in the production of fluid cream for said marketing area and who produce not less than 65 per cent of the total volume of fluid cream produced for said marketing area by all such producers, desire that a stabilization and marketing plan for fluid cream be formulated for said area; but if a petition is presented to the director by producers whose major interest in the fluid cream business is in the production of fluid cream for said marketing area and who represent not less than 65 per cent of the total number of producers whose major interest in the fluid cream business is in the production of fluid cream for the marketing area and who produce not less than 65 per cent of the total volume of fluid cream produced for said marketing area by all such producers, it shall not be necessary that such hearing be held.

If the director finds that a stabilization and marketing plan is necessary to accomplish the purposes of this chapter, he shall formulate a stabilization and marketing plan for fluid milk or fluid cream or both for such area and issue a notice of public hearing upon the plan formulated to all producers and distributors of record with the Department of Agriculture who may be subjected to the provisions of such plan. The notice of hearing may be effected by mail, or by publication for five successive days in a newspaper of general circulation in the area designated and shall specify the time and place of such hearing, which shall not be held prior to 10 days from the mailing, or from the final publication of such notice; provided, however, that if no daily newspaper of general circulation is published in the area designated, publication of notice for two successive weeks in a weekly newspaper of general circulation in the area will be considered proper publication of notice. At the hearing, interested parties shall be heard and records kept of the proceedings of such hearing for determination by the director whether the plan proposed will accomplish the purposes of this chapter. If, after public hearing the director determines that the proposed plan will tend to accomplish the purposes of this chapter within the standards herein prescribed, he shall issue an order to all producers and distributors of record with the director, and subject to the provisions of such plan, declaring such plan in effect within 30 days from the date of such hearing.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 941, Stats. 1939.)

Local control boards—producers

736.2. The director may appoint local control boards for the marketing areas established as prescribed herein to assist and advise him in matters pertaining to the production and marketing of fluid milk or fluid cream or both or to the operation of a stabilization and marketing plan. The board shall consist of seven members who shall be producers who supply fluid milk or fluid cream to the particular marketing area. The term of office of each such member shall be two years, unless the plan is terminated before said term expires. Said local board shall meet in regular session each month, and each member shall be allowed five dollars ($5) per diem and mileage at the rate of five cents ($0.05) per mile for attending such regular meetings. Said board with the previous approval of the director may employ such personnel as may be necessary in the performance of its duties and shall adopt rules and regulations for its conduct. The board shall submit a budget of its expenses to the director for his approval. The funds to be used for the maintenance of the board shall be paid from the proceeds of assessments and licenses paid to the director under the plan upon verified claims presented by the board to the director. The board shall not incur any expenses other than those for per diem and mileage, unless approved by the director.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Provisions of marketing plan

736.3. Any stabilization and marketing plan shall contain the following provisions:

(a) Provisions for prohibiting distributors and retail stores from engaging in the unfair practices hereinafter set forth:

Unfair practices

(1) The payment, allowance or acceptance of secret rebates, secret refunds, or unearned discounts by any person, whether in the form of money or otherwise.

(2) The giving of any milk, cream, dairy products, services or articles of any kind, except to bona fide charities, for the purpose of securing or retaining the fluid milk or fluid cream business of any customer.

(3) The extension to certain customers of special prices or services not made available to all customers who purchase fluid milk or fluid cream of like quantity under like terms and conditions.

(4) The false or misleading advertising of fluid milk or fluid cream as defined in Section 654a of the Penal Code.

Contracts

(5) The purchase of any fluid milk in excess of 200 gallons monthly from any producer or association of producers unless a written contract has been entered into with such producer or association of producers stating the amount of fluid milk to be purchased for any period; the quantity of such milk to be paid for as Class 1, and the price to be paid for each of the several classes, but in any marketing area where an equalization pool is a part of a stabilization and marketing plan, such contract need not specify the quantity of milk in any one class. The contract shall also state the date and method of

payment, the charges for transportation if hauled by the distributor, and may contain such other provisions as are not in conflict with this chapter, and shall contain a proviso to the effect that the producer shall not be obligated to deliver in any calendar month fluid milk to be paid for at the minimum price for fluid milk that is used for Class 4, as said class is defined in Section 735.3 of this code. A signed copy of such contract shall be filed by the distributor with the director within five days from the date of its execution.

(6) The purchasing, processing, bottling, transporting, delivering or otherwise handling in any marketing area of any fluid milk or fluid cream which is to be or is sold or otherwise disposed of by such distributor at any place in the geographical area within the outer, outside and external boundaries or limits of such marketing area; whether such place is a part of the marketing area or not, at less than the minimum wholesale and minimum retail prices effective in such marketing area.

(7) The payment of a lesser price by a distributor to any producer for fluid milk or fluid cream which is distributed to any person, including agencies of the Federal, State or local government, located upon property within the geographical limits of any marketing area for less than the minimum prices established by the director to be paid by distributors to producers for fluid milk or fluid cream for said marketing area.

(8) The purchasing or receiving of any fluid milk or fluid cream by distributors from producers within a marketing area wherein a stabilization and marketing plan is in effect for less than the minimum prices established in such plan, regardless of whether such milk or cream is subsequently sold or distributed within or without such marketing area, or within or without the jurisdiction of the State of California; provided, however, that if such fluid milk or fluid cream is subsequently sold or distributed in another marketing area within the State of California where a stabilization and marketing plan is in effect, then the distributor shall pay the producer thereof not less than the minimum prices established in such plan in the marketing area wherein such milk or cream is sold or distributed; and provided further, that in the event such fluid milk or fluid cream is subsequently sold or distributed in any place within the jurisdiction of the State of California where no stabilization and marketing plan is in effect, then such milk or cream may be paid for by the distributor to the producer thereof at not less than the average price paid by distributors to producers for milk or cream of similar grade and quality at the plants in the vicinity where such milk or cream is so sold or distributed, as such prices are determined by the director from contracts required to be filed with him pursuant to this section.

Minimum milk prices to producers

(b) Provisions whereby the director designates and prescribes or provides methods for designating or prescribing minimum prices to be paid by distributors to producers, for

fluid milk in one or more of the various classes; provided, however, that the prices so designated or prescribed shall be based upon the economic relationship of the price of fluid milk for the marketing area involved to the price of manufacturing milk, taking into consideration the additional costs incurred in producing and marketing fluid milk over and above costs incurred in producing and marketing manufacturing milk; and provided further, the director finds that such prices will tend to effectuate the purposes and policy of this chapter and will insure consumers a sufficient quantity of pure and wholesome milk.

Any stabilization and marketing plan may contain the following provisions:

Report of milk received

(c) Provisions whereby distributors shall report to each producer from whom fluid milk is secured, the volume of fluid milk received from such producer in pounds of milk, the milk fat test of such milk and the amount of fluid milk in milk fat pounds paid for in the several classes and the prices paid for the various classes for each month.

Minimum cream prices to producers

(d) Provisions whereby the director designates and prescribes or provides methods for designating or prescribing minimum prices to be paid by distributors to producers for fluid cream; provided, that the prices so designated or prescribed shall be based upon the economic relationship of the price of fluid cream for the marketing area involved to the price of manufacturing cream, taking into consideration the additional costs incurred in producing and marketing fluid cream over and above costs incurred in producing and marketing manufacturing milk; and provided further, that the director finds that such prices will tend to effectuate the purposes and policy of this chapter and will insure consumers a sufficient quantity of pure and wholesome cream.

Equalization pools

(e) Provisions whereby the director designates or prescribes methods to provide uniform prices to be paid to all producers supplying fluid milk to distributors for pasteurization purposes in the marketing area involved by pooling the returns of all such fluid milk; provided, that no equalization pool shall be established unless the director, after hearing, determines that producers who supply distributors with not less than sixty-five (65) per cent of the total volume of fluid milk used for pasteurization purposes and who represent not less than sixty-five (65) per cent of the total number of such producers desire the establishment of such pool, but no hearing shall be necessary if said sixty-five (65) per cent, by volume and production, of such producers petition the director in writing to establish such equalization pool as a part of the plan. If the director finds that an equalization pool is necessary to carry out the provisions of this chapter he shall make provision therefor. The director may designate the local control board for the marketing area as his agency to operate the equalization pool and may permit such local board to employ a pool manager and such other necessary personnel

and to incur such expenses incidental to the operation of the pool as the director finds are necessary. The director is hereby empowered to require distributors to make reports to the pool manager at such intervals and in such detail as he finds is necessary for the operation of the pool which reports shall be kept confidential as to any individual distributor but shall be available to the director or his agents and the pool manager, and such employees of the pool as are necessary to the operation of the equalization pool.

No provision of any pooling program shall prevent any distributor from paying premiums for quality; provided, all producers supplying fluid milk of like quality to such distributor are paid similar premiums, nor shall any provision prohibit the paying of different prices to producers based on differentials in transportation, adjustments or deductions made by a cooperative association of producers to its members, including the blending of proceeds received from the sale of fluid milk by such cooperative in other markets. Distributors who purchase fluid milk from producers for pasteurization purposes shall deduct from payments due such producers at such time and in such manner such sums as the director determines are sufficient to insure uniform prices to all producers subject to the provisions of the equalization pool, irrespective of the usage of such fluid milk by the distributors. Distributors shall make, in addition to the deductions herein prescribed, such additional deductions per pound milk fat as the director finds necessary to pay all expenses incidental to the operation of the equalization pool, including the establishment of a reserve account to insure prompt payments to producers. The deductions herein prescribed are in addition to any other deductions prescribed by this chapter.

Sales stimulation or consumer educational programs

(f) Provision whereby sales stimulation or consumer educational programs may be formulated and administered to increase the consumption of fluid milk and fluid cream, or other dairy products; provided, that such programs shall be carried on without reference to a particular brand or trade name; and provided further, that no such sales stimulation or consumer educational program shall be carried on which shall make use of false or unwarranted claims on behalf of such products or which disparages the quality, value, sale or use of any fluid milk or fluid cream or any other agricultural commodity authorized by law to be marketed within such marketing area.

Before any stabilization and marketing plan may provide for sales stimulation and consumer educational programs, not less than 65 per cent of the producers and who produce not less than 65 per cent of the total volume of fluid milk consumed in any marketing area shall petition the director in writing for the inclusion of such a program as part of the stabilization and marketing plan. If such a program is requested by distributors it shall be necessary that not less than 65 per cent of the total number of distributors and who

distribute not less than 65 per cent of the total volume of fluid milk for consumption in the marketing area shall petition the director in writing for the inclusion of such a program as part of the stabilization and marketing plan.

The petition shall bear the signatures of petitioners, their addresses and the approximate daily volume of fluid milk handled in gallons and milk-fat pounds and the type of product distributed, together with the estimated cost of the program each month and the number of months the program is to continue in operation.

A sales stimulation and consumer educational program instituted by producers shall be financed by all producers supplying fluid milk to the marketing area. Such program, if instituted by distributors, shall be financed by all distributors supplying fluid milk to the marketing area. If such program is instituted by both producers and distributors, both producers and distributors shall finance the program equally.

If the program is instituted by producers the director is hereby empowered to require producers to pay assessments of not more than two mills per pound milk fat, or if the program is instituted upon a gallonage basis not more than seven mills for each 10 gallons of fluid milk received by distributor, including the production of distributors who are also producers.

If the program is instituted by distributors the director is hereby empowered to require distributors to pay assessments of not more than two mills per pound milk fat, or if the program is instituted upon a gallonage basis not more than seven mills for each 10 gallons of fluid milk received by distributors, including the production of distributors who are also producers.

If the program is instituted by both producers and distributors, the director is hereby empowered to require both producers and distributors to pay assessments for the purpose of providing funds for formulating, administering, and carrying on such program. The assessments to be paid by distributors shall not exceed two mills per pound milk fat, or if the program is instituted upon a gallonage basis not more than seven mills for each 10 gallons of fluid milk received by distributors including the production of distributors who are likewise producers. Assessments of not more than two mills per pound milk fat, or if the program is instituted upon a gallonage basis, not more than seven mills for each 10 gallons of fluid milk produced by producers and received by distributors, shall likewise be paid by producers. In no instance shall the combined assessments exceed four mills per pound milk fat, or if the program is instituted upon a gallonage basis not more than 14 mills for each 10 gallons of fluid milk received from producers and processed by distributors for distribution in the marketing area in the form of whole milk, fluid cream, or manufactured dairy products derived from fluid milk.

Before a program may be instituted a public hearing shall be called by the director; the procedure for which public hearing is to be the same as that required for the institution of a stabilization and marketing plan for fluid milk. At such public hearing testimony and evidence shall be taken to determine the necessity of such a program, the estimated costs of the program, the time during which the program is to be continued, and such other matters as are necessary in the institution of the program.

If, after public hearing and consideration of the testimony and evidence presented at said hearing, the director finds that a sales-stimulation and consumer educational program will tend to effectuate the purposes of this chapter, he shall issue an order making effective such program. Such order shall state the number of months the program shall continue in operation, the rate of assessment per pound milk fat or per gallon to be paid by those petitioning for the program, the names, addresses and business locations of the persons appointed to administer the program and such order may contain other provisions which are necessary and incidental to the operation of the program.

The person named in the order to administer the program shall be selected by the director in the following manner and in the following number:

(a) If the program was instituted by producers the director shall name five representative producers from nominations made at the public hearing by the petitioners.

(b) If the program was instituted by distributors the director shall name five representative distributors from nominations made at the public hearing by the petitioners.

(c) If the program was instituted by both producers and distributors the director shall name three representative producers from nominations made at the public hearing by the petitioning producers and three representative distributors from nominations made at the public hearing by petitioning distributors.

(d) Distributors who are also producers shall be eligible to nomination for service on, and may be named by the director to serve on the committee to administer any program for which they will be required to pay assessments, and at least one of the persons named by the director to serve on any committee to administer any program for which distributors who are also producers will be required to pay assessments shall be a distributor who is also a producer.

All programs shall be administered by the persons named in the order of the director making the program effective, and shall be administered subject to the approval of the director. All amounts required to be paid to the director under this section by producers or distributors shall be paid to such director on or before the fifteenth day of the month following the month during which such fluid milk was received by distributors and all distributors receiving milk from producers in any area where the provisions of this section are in effect

whereby the director is empowered to require payments from producers shall deduct and pay to the director such payments provided for under this section from the payments due for such distributors to such producers for fluid milk.

Upon the termination of any program, if there are any obligations arising thereunder, the final accrual or ascertainment of which requires further acts by any producer or distributor or by the persons appointed to administer the program or by the director, the power or duty to perform such further acts shall continue, notwithstanding such termination.

All moneys received by the director pursuant to this section shall be deposited in the Department of Agriculture Fund in the State Treasury allocated to each separate marketing area from which they are collected and disbursed only for the purposes specified subject to the approval of the director.

Any money received by the director in excess of the amount required for any program shall be returned at such time as the director may determine on a pro rata basis to the persons from whom such funds were collected.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 710, Stats. 1937; by Ch. 1214, Stats. 1941.)

736.4. No distributor subject to the provisions of any stabilization and marketing plan shall purchase milk from producers who do not comply with the provisions of this chapter and such plan. No such plan shall involve a limitation upon the production of fluid milk or fluid cream.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

(Secs. 736.5, 736.6, 736.7, added by Ch. 241, Stats. 1935, repealed by Ch. 3, Stats. 1937.)

Article 2a. Minimum Wholesale and Retail Prices

(Heading added by Ch. 413, Stats. 1937.)

736.10. Pursuant to the declaration and statements of facts, policy and purposes set forth in this chapter, the director is hereby vested with the additional administrative duty and authority to prescribe and enforce minimum wholesale prices and minimum retail prices as hereinafter set forth. Authority of director

(Added by Ch. 413, Stats. 1937.)

736.11. The director shall, as soon as possible after the effective date hereof, in all marketing areas wherein a stabilization and marketing plan is in effect under the provisions of this chapter, designate and prescribe or provide methods for designating and prescribing,

(a) Minimum wholesale prices, which, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors to retail stores including the prices at which fluid milk or fluid cream shall be sold by distributors to retail stores, restaurants, confectioneries and other places for consumption on the premises but excluding, however, the prices at which fluid milk or fluid cream, or both, shall be sold Wholesale prices

by distributors to retail stores owned or operated by such distributor; and

Retail prices

(b) Minimum retail prices which, as used herein, shall mean prices at which fluid milk or fluid cream, or both, shall be sold by distributors and retail stores to consumers.

At the time any stabilization and marketing plan is hereafter established under the provisions of this chapter, the director shall designate and prescribe, or provide methods for designating and prescribing, such minimum wholesale prices and such minimum retail prices; provided, however, that all prices established under the terms of this article shall be such prices as are determined by the director pursuant to the provisions of Section 736.12.

(Added by Ch. 413, Stats. 1937.)

Investigation

736.12. In determining minimum wholesale prices and minimum retail prices in any marketing area, the director shall first make an investigation in such marketing area to establish such facts as shall be necessary to permit him to carry out the intent of this article within the standards herein prescribed.

In making such investigation, the director may examine the books and records of distributors and retail stores in such marketing area and shall hold one or more public hearings, take testimony and may subpena witnesses. All testimony received at such hearings shall be under oath. Notice of any hearing held by the director, pursuant to this article, shall be given by the director to every distributor and retail store in such marketing area whose name appears upon the records of the Department of Agriculture or who files a request for the same with the department, by mail or by publication for the time and in the manner prescribed in Section 736.1 of this chapter. A record of any and all hearings held by the director, pursuant to this article, shall be made and filed in the office of the director and shall, at all times, be available to inspection by any interested person.

Economic factors to consider

In determining minimum wholesale and minimum retail prices for any marketing area, the director shall take into consideration the following economic factors operative in such marketing area:

(1) The quantities of fluid milk or fluid cream, or both, distributed in such marketing area.

(2) The quantities of fluid milk or fluid cream, or both, normally required by consumers in such marketing area.

(3) The cost of fluid milk or fluid cream, or both, in such marketing area to distributors and retail stores, which in all cases shall be, respectively, the prices paid by distributors to producers and the minimum wholesale prices, as established pursuant to this chapter.

(4) The reasonable cost of handling fluid milk or fluid cream, or both, incurred by distributors and retail stores, respectively, including all costs of hauling, processing, selling and delivering by the several methods used in such marketing area in accomplishing such hauling, processing, selling and

delivery, as such costs are determined by impartial audits of the books and records, or surveys, or both, of all, or such portion of the distributors and retail stores, respectively, of each type or class in such marketing area as are reasonably determined by the director to be sufficiently representative to indicate the costs of all distributors and retail stores, respectively, in such marketing area.

In determining the cost of handling and distributing fluid milk or fluid cream, or both, by retail stores handling commodities in addition to fluid milk or fluid cream, or both, the director shall determine the cost of doing business for each such representative retail store and for such purpose shall consider all costs and expenses of doing business including depreciation on inventory and equipment. In the absence of satisfactory evidence to the contrary, the cost of handling such fluid milk or fluid cream, or both, shall be presumed to be the same percentage as the cost of doing business of such retail store in conducting its entire business.

(4a) The reasonable cost of handling fluid milk or fluid cream, or both, incurred by distributors in hauling, processing, selling, and delivering to restaurants, confectioneries or other places for consumption on the premises wherein it is required by law that service to customers be made from the original containers. In fixing the minimum wholesale price to be paid distributors by such persons, the director shall take into consideration such legal requirements and other factors and distribution costs peculiarly affecting service to such persons, and if the director reasonably determines that such factors and costs require that the minimum wholesale prices to be paid distributors by such persons vary from the minimum prices established for other wholesale customers, the prices established to be paid by such persons may vary accordingly.

(5) The amount of the available capacity for processing and distributing fluid milk, or fluid cream, or both, of all distributors in such marketing area and the estimated extent to which such available capacity is being used by such distributors.

(6) The purchasing power of consumers in such marketing area.

Establishment of prices.

Following such hearings, investigation and examinations authorized above, the director shall establish minimum wholesale and minimum retail prices for such marketing area, and shall declare such prices effective in the same manner as that prescribed in this chapter for declaring producer prices effective; provided, that the director finds, in writing, with respect to such prices:

(1) That such prices are not more than reasonably sufficient to cover all necessary costs, according to the method or type of distribution, including a reasonable return upon necessary capital invested, of reasonably efficient distributors and retail stores engaged in the distribution of fluid milk, fluid cream, or

both, in such marketing area as such necessary costs of reasonably efficient distributors and retail stores are shown to the director by the facts available to the director from the investigations, surveys, audits, and hearings required in this section.

(2) That such prices will tend to maintain in the business of distributing fluid milk and fluid cream, or both, such number of reasonably efficient retail stores and distributors of fluid milk and fluid cream, or both, in such marketing area as the director finds is necessary to insure to consumers in such marketing area sufficient distribution facilities of the several types or methods commonly used by consumers.

(3) That such prices will protect the interests of consumers of fluid milk, fluid cream, or both, in such marketing area by insuring to them adequate and efficient distribution facilities of the several types or methods commonly used by them without requiring such consumers to pay more for their supplies of such fluid milk, fluid cream, or both, than is necessary to maintain such adequate and efficient distribution facilities in such marketing area.

(Added by Ch. 413, Stats. 1937; amended by Ch. 941, Stats. 1939.)

No sale below established price

736.13. No distributor shall sell to any retail store, restaurant, confectionery or other place for consumption on the premises, or to any consumer, and no retail store, restaurant, confectionery or other place for consumption on the premises, shall purchase from any distributor or sell to any consumer, any fluid milk or fluid cream, or either of them, at less than the prices as established by the director under the provisions of this article, and the use or attempted use of any method, device or transaction whereby any distributor sells or offers or agrees to sell to any retail store, restaurant, confectionery or other place for consumption on the premises, or consumer or any retail store, restaurant, confectionery or other place for consumption on the premises, buys or offers or agrees to buy from any distributor, or sells or offers or agrees to sell to any consumer fluid milk or fluid cream, or either, at a price less than that established by the director under the provisions of this article, whether by discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift, or otherwise and whether any such discount, rebate, free service, advertising allowance, lease of refrigeration or other equipment, or gift applies directly to fluid milk or fluid cream or is allowed upon or in connection with the sale or handling of any other commodity or product, is hereby prohibited. Every distributor in any marketing area wherein an order establishing minimum wholesale and minimum retail prices is in effect shall file with the director schedules and any amendments thereto setting forth the prices at which each such distributor is selling or offering or agreeing to sell fluid milk, fluid cream and dairy products, excluding butter, cheese, cottage cheese, canned milk, powdered milk, casein and ice cream, in such marketing area. Such filings shall be made in such office of the director as he

(Filing of price schedules)

shall designate. Such prices shall not become effective until the fifth day after filing. Evidence of any sale of, or offer or agreement to sell such fluid milk, fluid cream or dairy products by a distributor, made as part of, or in connection with the sale of, or offer or agreement to sell fluid milk and fluid cream, or both, in a marketing area where prices for fluid milk or fluid cream, or both have been established by the director, at less than the prices theretofore filed with the director by such distributor pursuant to the provisions of this section, shall constitute prima facie proof of a violation of this section. Offers and agreements to sell, as used herein shall include offers and agreements which are conditional, or which shall become effective, upon the filing thereafter of amended prices by the distributor making such offer. Upon receipt of such amendments the director shall forthwith date, file, and index the same in such manner that the information therein contained shall at all times be kept current and be readily available to any interested party desiring to inspect the same. Any other distributor in the marketing area may meet any such prices so filed; provided, that such distributor shall file with the director a schedule of prices not exceeding the prices so met by him within 24 hours after meeting the same.

(Added by Ch. 413, Stats. 1937; amended by Ch. 1214, Stats. 1941.)

Fee paid by distributors

736.14. Distributors who are subject to the provisions of this article shall pay to the director on all milk fat contained in fluid milk and fluid cream purchased from producers, including their own production, if any, a fee in mills per pound of milk fat equal to that required to be deducted from the payments due producers of fluid milk under Section 737.6 of this code. The amount so received by the director shall be used in the administration and enforcement of this chapter or any stabilization or marketing plan established by this chapter. Any amounts in excess of that required for this purpose shall be returned pro rata, at such times as the director may determine, to distributors from whom such sums were collected.

(Assessments)

(Added by Ch. 413, Stats. 1937; amended by Ch. 1214, Stats. 1941.)

Local control board distributors

736.15. The director may appoint local control boards for the marketing areas established pursuant to this chapter to assist and advise him in matters pertaining to the marketing, distribution and sale of fluid milk or fluid cream or both. The board shall consist of seven members, who shall be residents of or engaged in business within the marketing area for which they are appointed by the director, three of whom shall be persons whose major interest is the distribution, marketing or sale of fluid milk or fluid cream or both, one producer-distributor, two retail storekeepers and one person, representative of the consuming public, who has no connection with the milk or cream business. The terms of office of each member shall be two years, unless the plan is terminated before said

term expires. Said local board shall meet in regular session each month, and each member shall be allowed five dollars ($5) per diem and mileage at the rate of five cents ($0.05) per mile for attending such regular meetings. Said board with the previous approval of the director may employ such personnel as may be necessary in the performance of its duties and shall adopt rules and regulations for its conduct. The board shall submit a budget of its expenses to the director for his approval. The funds to be used for the maintenance of the board shall be paid from the proceeds of fees and licenses paid to the director under the plan upon verified claims presented by the board to the director. The board shall not incur any expenses other than those for per diem and mileage, unless approved by the director.

(Added by Ch. 413, Stats. 1937.)

(Heading Article 3, [Control of Fluid Cream] and Secs. 737, 737.1, 737.2, 737.3 and 737.4 [added by Ch. 241, Stats. 1935], all repealed by Ch. 3, Stats. 1937.)

Article 3. Licenses

(By amendment, Article 4 [Licenses], added by Ch. 241, Stats. 1935, became Article 3, Licenses, by Ch. 3, Stats. 1937.)

Distributor's license

737.5. (a) After thirty (30) days after the effective date of this chapter no distributor shall deal in fluid milk or fluid cream without first having obtained a license from the director. The special licenses provided in this section are in addition to any and all licenses required by any other section of Division 4, Agricultural Code, or any law or ordinance of any county or municipality of this State. Applications for the licenses herein provided shall be made on forms prescribed by the director and shall state the name and address of the applicant and such details as to the nature of the applicant's business as the director may require. Such applicant shall further satisfy the director of his or its character, responsibility and good faith in seeking to carry on the business stated in the application. Licenses shall be issued for a period of twelve (12) months from the first day of each year or for the remainder of the calendar year from the date of issuance. Application for a new license for the following year by a licensee shall be made at least thirty (30) days prior to the commencement of such year, and if not so made the applicant shall pay an additional sum equal to 50 per cent of the license fee before such license shall be issued.

(Renewal penalty)

Distributor's bond

(b) Every distributor before purchasing any fluid milk or fluid cream from a producer must execute and deliver to the director a surety bond in the minimum sum of one thousand dollars ($1,000), executed by the applicant as principal and by a surety company qualified and authorized to do business in this State as surety. Said bond shall be upon a form approved by the director, and shall be conditioned upon the payment in the manner required by this chapter, of all amounts due to producers for fluid milk and fluid cream

purchased by such licensee or applicant during the license year. Said bond shall be to the State in favor of every producer of fluid milk and fluid cream. In case of failure by a distributor to pay any producer or producers for fluid milk or fluid cream in the manner required by this chapter, the director shall proceed forthwith to ascertain the names and addresses of all producer-creditors of such distributor, together with the amounts due and owing to them and each of them by such distributor, and shall request all such producer-creditors to file a verified statement of their respective claims with the director. Thereupon the director shall bring an action on the bond on behalf of said producer-creditors. Upon any action being commenced upon said bond, the director may require the filing of a new bond and immediately upon a recovery in any action upon such bond, such distributor shall file a new bond, and upon failure to file same within ten (10) days in either case, such failure shall constitute grounds for the revocation or suspension of the license of such distributor. In the event that recovery upon the bond is not sufficient to pay all of the claims as finally determined and adjudged by the court, any such amount recovered shall be divided pro rata among said producer-creditors.

Amount of bond

The minimum bond of one thousand dollars ($1,000) shall be required of distributors purchasing an average daily quantity of fluid milk of less than 100 gallons; distributors purchasing an average daily quantity of 100 gallons and less than 200 gallons must post a bond in the amount of two thousand dollars ($2,000); distributors purchasing an average daily quantity of 200 gallons and less than 300 gallons must post a bond in the amount of three thousand dollars ($3,000); distributors purchasing an average daily quantity of 300 gallons or more shall post a bond in the sum of five thousand dollars ($5,000).

The same bond requirements shall apply to purchases of fluid cream, except that for the purposes of computation of the required bond, 10 gallons of fluid cream shall be deemed the equivalent of 100 gallons of fluid milk.

In the event that any distributor so increases his purchases of fluid milk or fluid cream during the license year that said purchases exceed the amount for which said distributor is bonded, said distributor shall forthwith post such additional bond or bonds as may be required to comply with the provisions of this section.

The licenses and bonds provided for in this section shall be required for each distributor, and for the purposes of this section each subsidiary milk plant or branch milk plant whether under one ownership or not shall be considered as an individual distributor.

Failure of any distributor who purchases fluid milk or fluid cream from producers to execute and deliver the bond as herein provided and required shall constitute a violation of

this chapter; failure of any such distributor to post such additional bond or bonds as may be required to comply with the provisions of this chapter shall likewise constitute a violation of this chapter.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 941, Stats. 1939; by Ch. 1214, Stats. 1941.)

Distributor's license fee

737.6. The fees for all licenses shall be as follows, based on the volume of fluid milk and fluid cream handled for the previous year, provided that any distributor who has not previously engaged in such business during such prior year shall pay such minimum license fee as provided by this chapter.

(a) Distributors purchasing or handling an average daily quantity of fluid milk of less than 50 gallons shall pay a license fee of three dollars ($3); distributors purchasing or handling an average daily quantity of 50 gallons and less than 100 gallons shall pay a license fee of five dollars ($5); distributors purchasing or handling an average daily quantity of 100 gallons, and less than 200 gallons, shall pay a license fee of ten dollars ($10); distributors purchasing or handling an average daily quantity of 200 gallons, and less than 300 gallons, shall pay a license fee of fifteen dollars ($15); distributors purchasing or handling an average daily quantity of 300 gallons, and less than 500 gallons, shall pay a license fee of twenty-five dollars ($25); distributors handling an average daily quantity of 500 gallons or more shall pay a license fee of fifty dollars ($50).

Deduction from producers

(b) Distributors who are subject to the provisions of any stabilization and marketing plan made effective by this chapter, shall deduct from payments due producers for fluid milk, fluid cream or both, including each distributor's own production, the sum of two mills per pound milk fat on all milk fat contained in fluid milk, fluid cream or both, or in the case of distributors who do not purchase or receive fluid milk, fluid cream or both, in milk fat pounds, the sum of seven mills for each 10 gallons of fluid milk sold. The amount so deducted shall be paid to the director on or before the fifteenth of the month following the month during which such fluid milk or fluid cream was received. The amounts so received by the director shall be used in the administration and enforcement of this chapter, or any stabilization and marketing plan established by this chapter. Any amounts in excess of that required for this purpose shall be returned at such time as the director may determine to producers pro rata from whom such sums were collected.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Bond exemption

737.6-1. No bond shall be required of any distributor who purchases fluid milk or fluid cream from a producer-distributor; provided, that the buyer at the time of obtaining possession or control of each delivery pays for the same in full in lawful money of the United States; and provided, that said fluid milk or fluid cream is purchased in package form ready

for human consumption, and not in bulk form. Any distributor before purchasing fluid milk or fluid cream on the above terms shall notify the director of his intention to make such purchases, stating from whom, and the average daily quantity of such purchases. Such distributor shall also keep a record of such purchases, showing dates of purchases, amounts of purchases, and the name or names of seller or sellers, and shall make such other and further reports to the director as he may from time to time require.

(Added by Ch. 716, Stats. 1941.)

Penalties

737.7. (a) The violation of any provision of this chapter, or of any provision of any stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter, or of any of the unfair practices set forth in this chapter, is a misdemeanor, and is furthermore ground for revocation or suspension of license in the manner set forth in this chapter. The unfair practice provisions described in this chapter are hereby declared to apply to all distributors, whether or not a plan is in effect in the area in which a distributor is licensed or carries on business.

(b) Every distributor must pay for fluid milk or fluid cream delivered to him or it at the time and in the manner specified in the contract with the producer; failure to make such payment is hereby declared to be a violation of this chapter, and ground for refusal, suspension or revocation of license in the manner set forth in this chapter.

(c) Any person who violates any provision of a stabilization and marketing plan or any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream shall be liable civilly in the sum of five hundred dollars ($500) for each and every violation, such sum to be recovered by the director in any court of competent jurisdiction. All sums recovered under this section shall be deposited in the State Treasury to the credit of the Department of Agriculture Fund.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 1214, Stats. 1941.)

Reports

737.8. All such distributors shall make and file with the director at least once each month such reports as the director may require to enable him to enforce the provisions of this chapter.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

737.9. Any record or report made to the director pursuant to the provisions of this article shall be confidential and shall not be divulged except when necessary for the proper determination of any court proceedings or hearing before the director.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

737.10. The director shall, within 30 days prior to each regular session of the Legislature, submit to the Governor a full and true report of the transactions under this chapter during the preceding biennium, including a complete statement of receipts and expenditures during such period.

(Added by Ch. 243, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Refusal or revocation of license

737.11. (a) The director may refuse to grant any license herein provided and may, after due hearing upon a verified complaint signed and filed with the director by any interested person, revoke or suspend any such license as the case may require, when he is satisfied that any applicant or licensee has violated any provision of this chapter, or any provision of any stabilization and marketing plan formulated under the provisions of this chapter, or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk or fluid cream formulated under the provisions of this chapter. Upon the filing of such verified complaint, the director shall cause a copy thereof, together with a notice of the time and place of hearing of such complaint, to be served personally or by mail upon the person or persons named as respondent or respondents therein. Such service shall be made at least ten (10) days before said hearing, which shall be held in the city or town in which is situated the principal place of business of the licensee or respondent, or in which the transaction or violation complained of is said to have occurred, or in the county seat of the county in which the transaction or violation complained of is said to have occurred, or in the nearest office of the State Department of Agriculture, at the discretion of the director. At the time and place appointed for such hearing the director or his agents shall hear the parties to said complaint, and shall enter in the office of the director at Sacramento a decision either dismissing such complaint or specifying the facts established on such hearing. A copy of such decision shall be furnished to each, every and all of the respective parties thereto.

Hearing of verified complaint

(b) Such decision may include an order refusing, revoking or suspending the license applied for or held by the respondent, or affixing such other conditional and probationary orders as may be proper for the enforcement of this chapter or any of the provisions thereof or of any stabilization and marketing plan formulated hereunder.

(c) At the time of the filing of the verified complaint herein provided, or after any decision as above described, the director may thereupon and in the premises issue to and serve upon said person or respondent, an order directing said person or respondent to show cause why the license of said person or respondent should not be suspended or revoked for the violation complained of in the verified complaint or specified in the decision.

(d) Where the order to show cause is heard separately from the case or hearing set forth in the verified complaint,

a copy of the said order to show cause, together with notice of the time and place of hearing upon said order, shall be served personally or by mail upon said person or respondent. Said order shall refer to an attached copy of a verified complaint, or to such other notice, affidavit or official document, in such a way as generally to advise and inform the respondent of the charge or violation upon which said order is based and pursuant to which it is issued. Such service shall be made at least ten (10) days before said hearing, which shall be held in the city or town in which is situated the principal place of business of the respondent, or in which the transaction or violation complained of is said or charged to have occurred, or in the county seat of the county in which the transaction or violation complained of is said or charged to have occurred, or at the nearest office of the State Department of Agriculture, at the discretion of the director.

(c) At the time and place appointed for such hearing the director or his agents shall hear the matter set forth in the order, and the showing of the licensee in the premises, and shall enter in the office of the director at Sacramento an order and decision specifying the facts, dismissing the order to show cause or directing the suspension or revocation of the license or licenses held by the licensee, or making such other conditional or probationary orders as may be proper, upon the evidence presented at such hearing. A copy of said order and decision shall be furnished to the licensee. Previous violation by any applicant or by any person connected with said applicant of any provision of this chapter or of any stabilization and marketing plan formulated thereunder or of any order of the director establishing minimum wholesale and minimum retail prices for fluid milk and fluid cream shall be good and sufficient ground for denial, revocation or suspension of a license.

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937; by Ch. 941, Stats. 1939; by Ch. 1214, Stats. 1941.)

737.12. The provisions of Article 3 with respect to licenses shall not apply to retail stores as said stores are defined in this act. Retail stores exempt from license

(Added by Ch. 241, Stats. 1935; amended by Ch. 3, Stats. 1937.)

Article 4. Construction and Interpretation

(Heading added by Ch. 413, Stats. 1937.)

738. The Legislature hereby declares that by making any additions to, or amendments of, Chapter 10 of Division 4 of this code in the Fifty-second Regular Session of the California Legislature, it intends to formulate a comprehensive scheme for the regulation of marketing and distribution of fluid milk and fluid cream. If, however, any provision of, or amendment or addition to, said Chapter 10 of Division 4 of this code, either as originally enacted or as amended or added to

Separability

at said session, should be held to be unconstitutional, the unconstitutionality of such provision shall not affect any other provision of said chapter.

If any article, section, subsection, sentence, clause or phrase of any provision of Chapter 10 of Division 4 of this code is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining provisions of said chapter. The Legislature hereby declares that it would have enacted each article, section, subsection, sentence, clause or phrase of said chapter irrespective of the fact that one or more other articles, sections, subsections, sentences, clauses or phrases be declared unconstitutional.

(Added by Ch. 413, Stats. 1937.)

FOOTNOTE.—Sec. 10, Ch. 1214, Stats. 1941 (separability clause), applies only to Sections 735.3, 735.4, 736.3, 736.13, 736.14, 737.5, 737.7, and 737.11, and reads as follows:

SEC. 10. If any article, section, subsection, sentence, clause or phrase of any provision of this act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining provisions of said act. The Legislature hereby declares that it would have enacted each article, section, subsection, sentence, clause or phrase of said act irrespective of the fact that one or more other articles, sections, subsections, sentences, clauses or phrases be declared unconstitutional.

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APPENDIX "B"

CHAPTER 65

Statutes of 1941

Senate Joint Resolution No. 17—Relative to memoralizing Congress to enact legislation requiring Federal Governmental agencies to comply with California minimum price laws for milk. (Filed with Secretary of State April 28, 1941.)

WHEREAS, Prior to 1935 unfair, unjust, destructive, and demoralizing trade practices had been carried on in the production and distribution of fluid milk and fluid cream, which practices constituted a constant menace to the health and welfare of the inhabitants of the State of California, and tended to undermine sanitary regulations and standards of content and purity of fluid milk and fluid cream; and

WHEREAS, In the opinion of the Legislature of the State of California, health regulations were insufficient to prevent disturbances in the milk industry, which disturbances threatened to destroy and seriously to impair the future supply of fluid milk; and

WHEREAS, To safeguard the consuming public from future inadequacy of supply of this necessary commodity, the Legislature of the State of California in 1935 declared that it was the policy of the State of California to promote, foster, and encourage the intelligent production and orderly marketing of commodities necessary to its citizens, including milk, and to eliminate speculation, waste, improper

marketing, unfair and destructive trade practices, and improper accounting for milk purchased from producers of such milk; and

WHEREAS, As a result of such declaration of policy, the Legislature of the State of California declared that the production, transportation, processing, storage, distribution, and sale of fluid milk and fluid cream in the State of California is an industry affecting the public health and welfare, and thereupon enacted a law providing for the stabilization of marketing of fluid milk and fluid cream, which law is Chapter 10 of Division 4 of the Agricultural Code of the State of California, and bestowed upon the Director of Agriculture of the State of California the administrative authority, after investigation and public hearing, to prescribe marketing areas wherein different prices and regulations should be defined; and

WHEREAS, Under said law the Director of Agriculture of the State of California has established stabilization and marketing plans in 16 marketing areas within said State of California, providing minimum prices to be paid to producers of fluid milk, and in connection with said plans has established in 13 marketing areas within said State of California, schedules of minimum wholesale and minimum retail prices for fluid milk; and

WHEREAS, Approximately 85 per cent of the fluid milk produced and distributed in the State of California is marketed under said market controls, said 85 per cent being approximately equivalent to 73,000,000 pounds of milk fat

yearly, to an approximate value of forty-two million dollars ($42,000,000) to California producers of fluid milk; and

WHEREAS, Since the adoption of the California State Milk Control Law, the dairy industry, with the aid of the State, has corrected certain evils and has developed and maintained satisfactory marketing conditions and has brought about a reasonable amount of stability and prosperity in the production and marketing of fluid milk and fluid cream; and

WHEREAS, The expansion and extension of the National Defense Program has resulted in the great and continuing increase in the number and personnel of defense units quartered in the State of California and in milk marketing areas thereof, and a great and continuing increase, in said areas, of the consumption of fluid milk, whereby a large and increasing percentage of the fluid milk marketed in California is sold to and consumed by said defense units; and

WHEREAS, Quartermasters, Purchasing Officers and other Supply Officers of the Army, Navy, Marine Corps, CCC, Air Corps, Flying Schools, and of other military and naval units of the United States are directed or required by Federal law, rule, order or regulation to make purchases of food supplies, including fluid milk, at competitive bid prices, regardless of minimum price regulations and schedules established by the Director of Agriculture of the State of California; and

WHEREAS, The Attorney General of the State of California has advised the Director of Agriculture of the State of California that said director is without power or jurisdiction to apply or enforce minimum producer price schedules or minimum resale price schedules as to fluid milk sold or delivered to agencies or units of the United States Government quartered on property or premises ceded to or owned by the United States Government; and

WHEREAS, Distributors of fluid milk in competing for the fluid milk business of said defense units so situated make bids and offers of sales and actual sales of fluid milk for delivery to said units at prices below the minimum prices established by the Director of Agriculture, and in turn pay and return to the producers supplying such fluid milk prices below the minimum prices established and ordered by said director to be paid to said producers, resulting in severe operating losses which can not at this time be approximated, but which may be estimated at many thousands of dollars per day to aggregate California producers supplying such milk for such purposes; and

WHEREAS, From the foregoing there have resulted enormous and continuing losses to California producers of fluid milk, unutterable confusion and chaotic marketing conditions, and breakdown of the law and of minimum producer price and minimum resale schedules established thereunder; and

WHEREAS, If said situation is permitted to continue, California producers of fluid milk face loss of income, possible bankruptcy, and financial disaster; and

WHEREAS, California producers of fluid milk are in the premises forced to shoulder an unfair and disproportionate part of the cost, duty and burden imposed by the National Defense Program on all citizens, thus resulting in disorganization and unstabilization of the fluid milk business of the State of California, resulting in turn in great and inestimable losses to producers and distributors of fluid milk; and

WHEREAS, It is vital to the dairy industry of the State of California, which, as aforesaid, is an industry affecting the public health and welfare of the people of the State of California, that not less than the minimum prices fixed by the Director of Agriculture of the State of California be charged in such areas; now, therefore, be it

Resolved by the Senate and Assembly of the State of California, jointly, That the Legislature of this State hereby memorializes and recommends to the Congress of the United States that it pass and enact, forthwith and as an emergency measure, such laws, statutes, rules or regulations, as will direct and require purchasing officers of the Army, Navy, Marine Corps, Air Corps, or such others as may be in authority over the purchasing of food supplies for the above and other defense units or other agencies of the United States quartered in the State of California, and in milk marketing areas in said State, to regard as unlawful and to refuse to entertain or consider or accept bids or offers from any distributor or producer of fluid milk, which bids or offers are below the minimum prices established by the Director of Agriculture pursuant

to the provisions of California's Milk Stabilization Law or amendments thereof, and that said Congress declare, by joint congressional statute, or otherwise, that where the minimum price of fluid milk and fluid cream is fixed by competent State legal authority, said purchases by the Federal Government within the geographical areas of the State of California, and upon territory ceded by such State to the Federal Government, shall be at prices not less than the minimum prices declared by such competent State legal authority.

APPENDIX "C".

Santa Clara County Order Number Two (2) of the Director of Agriculture Declaring in Effect Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, Together With Rules and Regulations Pertaining Thereto, for the Santa Clara County Marketing Area, as Modified.

WHEREAS, the Director of Agriculture of the State of California, acting pursuant to and by virtue of the authority vested in him by the provisions of Chapter 10, Division IV of the Agricultural Code of the State of California, as Amended, issued General Order Number Thirty-four (34) prescribing the Santa Clara County Marketing Area, which Order became effective November 20, 1937, and subsequent thereto issued General Order Number Ninety-eight (98) modifying the said Santa Clara County Marketing Area, which Order became effective October 16, 1940, and

WHEREAS, the Director of Agriculture, acting pursuant to and by virtue of the authority vested in him by the provisions of Chapter 10, Division IV of the Agricultural Code of the State of California, as Amended, issued General Order Number Ninety-nine (99) declaring in effect a Stabilization and Marketing Plan for Fluid Milk, together with Rules and Regulations pertaining thereto, for the Santa Clara County Marketing Area, as Modified, which Plan became effective October 16, 1940, and

WHEREAS, said Stabilization and Marketing Plan for Fluid Milk for said Area was amended by General Order Number One Hundred and Thirty-three (133), and Santa Clara County Order Number One (1) issued by the Di-

rector of Agriculture, effective March 1, 1941 and October 24, 1941, respectively, and

WHEREAS, the Director of Agriculture, acting pursuant to and by virtue of the authority vested in him by the provisions of Chapter 10, Division IV of the Agricultural Code, as Amended, issued General Order Number One Hundred (100), declaring in effect Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, together with Rules and Regulations pertaining thereto, for the Santa Clara County Marketing Area, as Modified, which Schedules and Rules and Regulations became effective October 16, 1940, and

WHEREAS, said Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk for said Area were amended by General Order Number One Hundred and Thirty-four (134), issued by the Director of Agriculture effective March 1, 1941, and

WHEREAS, the Director of Agriculture finds that said Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, made effective by General Order Number One Hundred and Thirty-four (134), as aforesaid, do not now conform fully to the standards prescribed in nor tend to effectuate fully the purposes of said Statute, and

WHEREAS, the Director of Agriculture has heretofore made investigations, examined books and records of distributors and retail stores engaged in the distribution of fluid milk in said Area, formulated and proposed Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, together with Rules and Regu-

lations pertaining thereto, for said Marketing Area, and has held a public hearing thereupon in said Area, as required by Section 736.12 of said Code, which hearing was held in the Civic Auditorium, San Jose, California, on September 25, 1941, and due notice thereof was given by the Director of Agriculture to each distributor and retail store in said Marketing Area whose name appears upon the records of the Department of Agriculture for the Santa Clara County Marketing Area, as Modified, or who filed a request for the same with the Department as prescribed in said Section of said Code, and

WHEREAS, at said public hearing, the Director of Agriculture, acting through the person of his duly authorized agent, L. J. Weishaar, Assistant Chief, Bureau of Market Enforcement, Department of Agriculture, State of California, presented for consideration said proposed Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, together with Rules and Regulations pertaining thereto, for the Santa Clara County Marketing Area, as Modified, introduced all exhibits and evidence upon which such prices were proposed and received all testimony and evidence, both oral and documentary, including amendments offered by persons present at said public hearing, relating to said proposed Schedules, as Amended, and Rules and Regulations, and all persons were given an opportunity to be heard and to examine all such testimony and evidence, and a full and complete record was kept of such testimony and proceedings, to which record, on file in the office of the Director of Agriculture, reference is hereby made, and

WHEREAS, the Director of Agriculture, acting through the person of his duly authorized agent, W. J. Kuhrt,

Chief, Bureau of Markets, Department of Agriculture, State of California, after consideration of the amendments, testimony and evidence presented at said public hearing, finds that the Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, together with Rules and Regulations pertaining thereto, for the Santa Clara County Marketing Area, as Modified, attached hereto, conform to the standards prescribed in Section 736.12 of the said Code, in that:

(a) Such prices are not more than reasonably sufficient to cover all necessary costs according to the method or type of distribution, including a reasonable return upon necessary capital invested, of reasonably efficient distributors and retail stores engaged in the distribution of fluid milk in said Marketing Area, as such necessary costs of reasonable efficient distributors and retail stores are shown by the facts disclosed, made available and discovered from the investigations and surveys made and hearings held, as required by said Section 736.12 of said Code;

(b) Such prices will tend to maintain in the business of distributing fluid milk such number of reasonably efficient retail stores and distributors of fluid milk in said Marketing Area as the Director finds is necessary to insure to consumers in said Marketing Area sufficient distribution facilities of the several types or methods commonly used by consumers;

(c) Such prices will protect the interests of consumers of fluid milk in said Marketing Area by insuring to them

adequate and efficient distribution facilities of the several types or methods commonly used by them without requiring such consumers to pay more for their supplies of such fluid milk than is necessary to maintain such adequate and efficient distribution facilities in said Marketing Area;

(d) The Rules and Regulations of the Director of Agriculture pertaining to the Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, attached hereto, are necessary to effectuate the purposes of Chapter 10, Division IV of the Agricultural Code, as Amended, and to enable the Director of Agriculture to administer and enforce the said Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, within the standards as prescribed by Chapter 10, Division IV of said Code, and

WHEREAS, in determining the Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, attached hereto, the Director of Agriculture, acting through the person of his duly authorized agent, W. J. Kuhrt, as aforesaid, has taken into consideration the following economic factors operative in said Area:

(a) The quantities of fluid milk distributed in said Marketing Area;

(b) The quantities of fluid milk normally required by consumers in said Marketing Area;

(c) The cost of fluid milk to distributors and retail stores in said Marketing Area, which in all cases is the price paid by distributors, as established in the Stabilization and Marketing Plan for Fluid Milk, as Amended, to become effective in said Marketing Area, October 24, 1941, pursuant to the provisions of Santa Clara County Order Number One (1), and the minimum wholesale prices set forth in the Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, attached hereto;

(d) The reasonable cost of handling fluid milk incurred by distributors and retail stores, respectively, including all costs of hauling, processing, selling and delivering, by the several methods used in such Marketing Area in accomplishing such hauling, processing, selling and delivery, as such costs have been determined by impartial surveys and audits of the books and records of such portion of the distributors and retail stores, respectively, of each type or class in said Marketing Area, as have been found by the Director to be representative to indicate the costs of all distributors and retail stores, respectively, in said Marketing Area, and in determining the cost of handling and distributing fluid milk by retail stores handling commodities in addition to fluid milk, the Director has considered all costs and expenses of doing business, including depreciation on inventory and equipment;

(e) The reasonable cost of handling fluid milk incurred by distributors in hauling, processing, selling and deliver-

ing to restaurants, confectioneries, or other places for consumption on the premises wherein it is required by law that service to customers be made from the original container. In fixing the minimum wholesale prices to be paid distributors by such persons, the Director has taken into consideration such legal requirements and other factors and distribution costs peculiarly affecting service to such persons, and has established the prices in accordance with the said requirements;

(f) The amount of available capacity for processing and distributing fluid milk of all distributors and retail stores in said Marketing Area and the extent to which such available capacity is being used by said distributors and retail stores;

(g) The purchasing power of consumers in said Marketing Area.

Now, therefore, it is ordered by the Director of Agriculture, acting through the person of his duly authorized agent, W. J. Kuhrt, as aforesaid, pursuant to and by virtue of the authority vested in him by the said Chapter 10, Division IV of the Agricultural Code, as Amended, that:

(a) The attached Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, for the Santa Clara County Marketing Area, as Modified, and

(b) The attached Rules and Regulations of the Director of Agriculture pertaining to said Schedules, prescribed herein and which follow hereinafter, shall be and the same are hereby declared to be in effect on and after 12:01 A. M., Pacific Standard Time, October 24, 1941, and shall thereupon and thereafter remain in effect as provided in the said Chapter 10, Division IV of the said Code.

In Witness Whereof, this Santa Clara County Order Number Two (2) of the Director of Agriculture, declaring in effect Schedules of Minimum Wholesale and Minimum Retail Prices for Fluid Milk, as Amended, together with Rules and Regulations pertaining thereto, for the Santa Clara County Marketing Area, as Modified, is hereby executed and issued in the City of Secramento, California, this 17th day of October, 1941.

W. J. CECIL
Director of Agriculture

By (Signed) W. J. KUHRT
W. J. KUHRT, Chief
Bureau of Markets

(Sealed with the Seal of the State Department of Agriculture)

Section 4. Special Provisions Relating to Fluid Milk Sold to Agencies of the Federal, State or Local Government. The following maximum reductions may be made below the prices contained in Part A of Schedules 1 to 9, inclusive, where the sale and delivery of fluid milk during any calendar month to designated delivery locations of agencies of the Federal, State or Local Government

amounts to the monthly total sales value as set forth in the classifications specified below;

When the monthly total sales value of fluid milk delivered during the calendar month is—	The following maximum percentage reductions below the minimum wholesale prices may be made:
$5,001 and over	12½%
3,001—5,000	10%
1,001—3,000	7½%
250—1,000	5%
100— 249	3%

Credit for any such reduction earned shall not be granted prior to the first (1st) day of the month following the month in which the reduction is applicable.

For the purpose of establishing a basis for fluid milk sales in accordance with this Section, a location shall be deemed to include any number of buildings located upon one piece of property and shall include military and naval reservations and hospitals or other establishments under the exclusive jurisdiction of the Federal, State or Local Government.

Schedule 7. When the price paid by distributors to producers for Class 1 fluid milk as established in the Stabilization and Marketing Plan for Fluid Milk for the Santa Clara County Marketing Area, is seventy-eight cents ($0.78) per pound milk fat contained in fluid milk, the minimum wholesale and minimum retail prices for fluid milk in the container sizes specified shall be as follows:

Schedule 7—Part A

Minimum Wholesale Prices for Fluid Milk

Quantity	Wholesale prices f.o.b. purchaser's business location		
	4.0% milk fat	4.5% milk fat	5.0% milk fat
10 gallons or more, bulk, per gallon	$0.36	$0.395	$0.43
5 gallons and less than 10 gallons, bulk, per gallon	.365	.40	.435
1 gallon and less than 5 gallons, bulk, per gallon	.37	.405	.44
Gallon bottle	.42	.44	.48
Half-gallon container	.21	.22	.24
Quart container	.1075	.115	.125
Pint container	.0625	.065	.07
Third-quart or three-quarter-pint container	.048	.050	.053
Half-pint container	.040	.042	.044

Schedule 7—Part B

Minimum Retail Prices for Fluid Milk

Quantity	Retail store carry-out prices			Retail home delivered prices		
	4.0% milk fat	4.5% milk fat	5.0% milk fat	4.0% milk fat	4.5% milk fat	5.0% milk fat
Gallon bottle	$0.47	$4.49	$0.53	$0.49	$0.51	$0.55
Half-gallon container	.24	.25	.27	.25	.26	.28
Quart container	.125	.13	.14	.13	.135	.145
Pint container	.075	.075	.08	.08	.08	.085

APPENDIX "D".

Report by the Bureau of Markets Regarding the Method Used to Determine the Cost of Distributing Fluid Milk to Agencies of the Federal Government for the Santa Clara County Marketing Area.

The Department's proposed price for fluid milk and for the discount schedule for sales of fluid milk to agencies of the Federal Government was based upon a study of milk plant operations in the Santa Clara County Marketing Area covering operations for the period January 1941 to July 31, 1941. This current survey brought up to this date a determination of increases in costs according to size of containers which had occurred since 1939, the year of a comprehensive survey and 166 page report on the cost of producing and of distributing fluid milk in this marketing area.

On the basis of these data, computations were made to determine the amount of savings on sales of fluid milk to agencies of the Government in that marketing area as compared with plant operations for sales in regular channels. The operating expense for the seven months of the year 1941 indicated a general increase of 10.98% over the cost of operations for the year 1939. Adjustments were made in proposing the resale price schedules which were made effective October 24, 1941.

The attached table shows a comparison of the cost of distribution of fluid milk in half-pint containers to the regular wholesale trade as compared with the cost of distributing half pints to agencies of the Federal Government. Raw product cost for distribution to the regular wholesale trade was based upon 4% milk-fat content at

78 cents per pound as compared with 3.5% milk, delivered to agencies of the Federal Government.

Processing and general and administrative costs per container are identical in each instance.

Delivery costs to the regular wholesale trade were based upon the delivery of 1000 labor units per day or the equivalent of 2000 half pints daily. In computing the delivery costs for fluid milk delivered to agencies of the Federal Government, the standard for delivery is 4000 half pints per day. Normal expense items which were eliminated in arriving at the cost of distributing milk to agencies of the Government were the cost of collectors, bad debt expense, selling expense, and advertising expense.

The result of these computations, based upon the delivery of 4000 half pints as compared with 2000 half pints and after making the above eliminations, represents a saving of .1462 of a cent per half pint below distributing expense to other wholesale customers. The difference in the raw product cost, comparing 4% milk with 3.5% milk at 78 cents, is .2096 of a cent. The total of raw product cost for government sales plus operating expenses for this type of distribution is 3.3802 cents per half pint, excluding return on distributor's investment compared with a total cost of distributing half pints to ordinary customers of 3.7360 cents per half pint. The minimum wholesale price established by the State for half pints of milk for the month of November was 4 cents. The discount allowed to the Federal Government on a monthly $3000 to $5000 volume, which is based on the 4000 half pint labor unit is 10% off the established minimum wholesale price of .04 cents per half pint.

SANTA CLARA COUNTY MARKETING AREA COMPARISON OF COSTS OF DISTRIBUTING FLUID MILK IN HALF-PINT CONTAINERS TO FEDERAL AGENCIES AS COMPARED TO REGULAR WHOLESALE DISTRIBUTION.

	Per half pint to Federal agencies ¢	Per half pint regular wholesale ¢	Difference ¢
Raw product cost	1.4674	1.6770	.2096
Processing	.5122	.5122	
General and administrative	.3437	.3437	
Delivery	1.0569	1.2031	.1462
Available return on investment (inc. prov. for fed. taxes)	.2198	.2640	.0442
Total, including return	3.6000	4.0000	.4000
Price effective	*3.6000	4.0000	.4000

*10% discount

BUREAU OF MARKETS,
CALIFORNIA DEPT. OF AGRICULTURE,
By E. L VEHLOW,
Fluid Market Milk Assistant.

APPENDIX "E."

Memorandum of Federal Acts Applicable to Interstate Commerce.

7 U. S. C., chapter 1, "Commodity Exchange Act." This act prohibits dealings in contracts for future deliveries of certain agricultural products.

7 U. S. C., chapter 3, "Grain Standards Act." This act authorizes the Secretary of Agriculture to investigate the handling, grading, and transportation of grain and corn, and to alter or modify standards of quality and condition whenever the necessities or the trade may require. When the standards are fixed by the Secretary no grain may move in interstate commerce unless inspected and graded by a licensed inspector.

7 U. S. C., section 116, provides that misbranded seeds transported in interstate commerce are subject to confiscation.

7 U. S. C., section 126, provides that adulterated and misbranded insecticides are prohibited from interstate commerce.

7 U. S. C., section 141, provides that transportation of insect pests in interstate commerce is prohibited.

7 U. S. C., section 158, requires certain markings on packages and inspection of packages of nursery stock for interstate shipment.

7 U. S. C., section 414, provides that upon request the Secretary of Agriculture may certify the records of farm products offered for interstate shipment.

7 U. S. C., section 492, provides that the Secretary of Agriculture "shall by regulation provide for the making

of prompt investigations and the issuing of certificates as to the quality and condition of produce received in interstate commerce or in the District of Columbia."

7 U. S. C., chapter 20. This is an act prohibiting destruction or dumping of farm products received in interstate commerce.

7 U. S. C., chapter 26A, "Agricultural Marketing Agreement Act of 1937," providing for arbitration of disputes concerning milk.

7 U. S. C., chapter 37, "Federal Seed Act." This act prohibits the movement in interstate commerce of seeds unless each container bears a label giving certain information about seeds, such as the name and kind of seed, origin, percentage of noxious weed seeds, etc.

* * * * *

15 U. S. C., chapter 1, "Sherman Anti-Trust Act."

15 U. S. C., chapter 2A, "Securities Act of 1933."

15 U. S. C., chapter 2B, "Securities Exchange Act of 1934."

15 U. S. C., chapter 2C, "Public Utility Holding Company Act of 1935."

15 U. S. C., chapter 2D, "Investment Company Act of 1940" and "Investment Advisers Act of 1940."

15 U. S. C., sections 231 to 241, provide standards for barrels used in interstate commerce.

15 U. S. C., sections 251-253, provide standard sizes of baskets and containers used in interstate commerce.

15 U. S. C., section 294, prohibits the transportation of misbranded silverware in interstate commerce.

15 U. S. C., section 404, provides for the confiscation of misbranded parcels containing caustic or corrosive substances which have been moved in interstate commerce.

15 U. S. C., chapter 15A, prohibits the interstate shipment of contraband oil.

15 U. S. C., chapter 18, prohibits the transportation in interstate commerce of firearms and ammunition except under license.

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16 U. S. C., sections 824, *et seq.*, provide for the regulation of electric utility companies engaged in interstate commerce.

16 U. S. C., chapter 13, provides for the regulation of interstate transportation of black bass.

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18 U. S. C., section 387, forbids interstate carriage of lottery tickets.

18 U. S. C., section 390, prohibits the shipping of packages of spirituous, vinous, malt or other fermented liquor not plainly marked.

18 U. S. C., section 392, prohibits the transportation of illegally killed game in interstate or foreign commerce.

18 U. S. C., section 396, prohibits the transportation of obscene books or literature in interstate or foreign commerce.

18 U. S. C., section 396a, prohibits the transportation of convict-made goods in interstate or foreign commerce.

18 U. S. C., section 397, "Mann Act."

18 U. S. C., section 407a, prohibits the transportation of strikebreakers in interstate commerce.

18 U. S. C., section 408, "National Motor Vehicle Theft Act."

18 U. S. C., section 408a, "Transportation of Kidnaped Persons in Interstate Commerce."

18 U. S. C., section 408c, applies to receiving, possessing, or disposing of money delivered as ransom money for kidnaped person transported in interstate commerce.

18 U. S. C., section 408d, applies to threatening communications in interstate commerce.

18 U. S. C., section 408e, applies to persons moving in interstate or foreign commerce to avoid prosecution for a felony or giving testimony.

18 U. S. C., section 412a, provides punishment for wrecking trains, engines, motor units, or cars used, operated, or employed in interstate commerce by any railroad.

18 U. S. C., sections 413-419, "National Stolen Property Act."

18 U. S. C., sections 420a-420e, prohibits interference with interstate or foreign commerce by violence, threats, or the purchase or rental of property or protective service.

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21 U. S. C., section 16, prohibits interstate commerce in falsely labeled or misbranded dairy or food products which misstate state or territory of origin.

21 U. S. C., section 20, provides "standard grades of apples when packed in barrels which shall be shipped or delivered for shipment in interstate or foreign commerce, or which shall be sold or offered for sale within the District of Columbia or the territories of the United States."

21 U. S. C., section 3, prohibits interstate commerce in filled milk.

21 U. S. C., sections 71-93, provide for the inspection of all slaughter houses, etc., the products of which are to be used in interstate or foreign commerce. Section 87 prohibits the movement in interstate commerce of meat not inspected by the Department of Agriculture.

21 U. S. C., section 96, prohibits the transportation of unmarked horse meat in interstate or foreign commerce.

21 U. S. C., chapter 9, "Federal Food, Drug, and Cosmetic Act."

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27 U. S. C., chapter 20A, "Perishable Agricultural Commodities Act."

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29 U. S. C., chapter 7, "National Labor Relations Act."

29 U. S. C., chapter 8, "Fair Labor Standards Act of 1938."

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42 U. S. C., chapter 4, regulating interstate and foreign commerce in viruses, serums, toxins, antitoxins, etc.

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47 U. S. C., Chapter V, "Communications Act of 1934," regulating interstate and foreign commerce in communication by wire and radio.

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49 U. S. C., "Interstate Commerce Act."

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55 Stat. 631, chapter 366, "National Cattle Theft Act."